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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 297

DIXILYN DRILLING CORPORATION, PETITIONER,

vs.

CRESCENT TOWING & SALVAGE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 4, 1962

CERTIORARI GRANTED OCTOBER 15, 1962

SUPREME COURT OF THE UNITED STATES

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[fol. 2]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

Number 871 In Admiralty

LIBEL—Filed December 22, 1958

To the Honorable Sidney C. Mize, Judge of the United States District Court for the Southern District of Mississippi

The Libel and Complaint of Mississippi State Highway Commission, City of Natchez, Mississippi and Department of Highways of the State of Louisiana

against

Dixilyn Drilling Corporation, Inc. and Crescent Towing & Salvage Company, Inc., alleges upon information and belief as follows:

First: The Mississippi State Highway Commission is a department of the State of Mississippi, created under and by virtue of the laws of the State of Mississippi, domiciled in the City of Jackson, County of Hinds, State of Mississippi; the City of Natchez is a Municipal Corporation chartered under and by virtue of the laws of the State of Mississippi, having its domicile in Adams County, State of [fol. 3] Mississippi; the Department of Highways of the State of Louisiana is a department of the State of Louisiana, created under and by virtue of the laws of the State of Louisiana, domiciled in the City of Baton Rouge, Parish of East Baton Rouge, State of Louisiana.

Second: The libelee or respondent, Dixilyn Drilling Corporation, Inc. with offices at 100 West 10th Street, Wilmington, Delaware, is a corporation organized under and by virtue of the laws of the State of Delaware, is authorized to and is doing business in the State of Mississippi, and has designated as its resident agent for process the C T Corporation System, 118 North Congress Street, Jackson, Hinds County, Mississippi; the libelee or respondent, Crescent Towing & Salvage Company, Inc. is a corpora-

tion organized under and by virtue of the laws of the State of Louisiana, having its domicile and principal office in the City of New Orleans, Parish of Orleans, State of Louisiana, with offices at 427 Balter Building, New Orleans, Louisiana, and, at the time of the collision hereinafter described, was traveling upon and using a public highway of the State of Mississippi, and who, by virtue of the exercise of the privilege of traveling upon and using a public highway of the State of Mississippi consented and designated as its resident agent for process, in Mississippi, the Secretary of State of the State of Mississippi.

[fol. 4] Third: The interests of the party libelants in this cause are as follows, to-wit:

1. The legal title, together with a reversionary equitable title, in and to the Natchez-Vidalia Bridge hereinafter described, is vested in the libelant, City of Natchez, Mississippi.

2. The present legal and equitable owners of the claim made by this libel are libelants, Mississippi State Highway Commission and Department of Highways of the State of Louisiana.

Fourth: By way of explanation as to the interests of the libelants as alleged in Paragraph Third of this libel, libelants state as follows:

The libelant, City of Natchez, Mississippi, is the lawful owner of said bridge, which it constructed many years ago at a huge cost, but pursuant to the laws of the State of Mississippi, particularly House Bill No. 77, Laws of 1952, the State Highway Commission of Mississippi was authorized and empowered, jointly with the Department of Highways of the State of Louisiana, to take over, assume jurisdiction of, operate, maintain, repair and improve the Natchez-Vidalia Bridge upon certain terms and conditions contained in said Act; by Act 199 of the 1952 Regular Legislative Session of Louisiana, the Department of Highways of the State of Louisiana was likewise authorized and empowered, jointly with the State of Mississippi, to take [fol. 5] over, assume jurisdiction of, operate, maintain, repair and improve the Natchez-Vidalia Bridge. Said Acts

also authorized and empowered the Department of Highways of the State of Louisiana and the Mississippi State Highway Commission to enter into an agreement whereby either one of the said departments might carry out the obligations and duties required of them under said Acts and charge the other with their proportionate cost thereof. Pursuant to the aforesaid laws of Mississippi and Louisiana the libelant herein, City of Natchez, Mississippi, on September 26, 1952, joined in an agreement by and between the aforesaid respective departments of Mississippi and Louisiana, whereby the Mississippi State Highway Commission agreed to be the agency which should henceforth perform or cause to be performed all work necessary to maintain and repair the aforesaid bridge, and the Louisiana Department of Highways, pursuant and subject to said agreement, would be liable for payment of fifty percent (50%) of the costs of such repair, maintenance, etc.

The City of Natchez, Mississippi, acting through and by its then Mayor, Walter P. Abbott, having been duly authorized by resolution by the Mayor and Board of Aldermen of the City of Natchez, adopted September 17, 1952, joined in the aforesaid agreement and by said agreement the City of Natchez relinquished and surrendered jurisdiction of said bridge and said approaches as therein set forth and described unto the Mississippi State Highway [fol. 6] Commission and the Department of Highways of the State of Louisiana and by said agreement and laws of the State of Mississippi and the State of Louisiana, said City was released from any further responsibility or liability for the operation, maintenance, repair and improvement of the said bridge and its approaches as described in said agreement; provided, however, if at any time following the date of said agreement said bridge should cease to be operated as a toll-free bridge, then, in that event, at the option of the governing authorities of said City, all rights and interests in said bridge and its approaches aforesaid would immediately and automatically revest in and revert to the said City of Natchez, Mississippi, all at the option of the governing authorities of the city and as provided by House Bill No. 77 of 1952 Regular Session of the Mississippi Legislature.

Fifth: On the early morning of December 27th at about 8:15 o'clock a.m., 1957, the libelees or respondents were engaged in towing a large offshore drilling rig along and upon the Mississippi River from Vicksburg, Mississippi to and through the mouth of the Mississippi River to a destination unknown to libelants, and at the aforesaid time approached the Natchez-Vidalia Bridge that spans the Mississippi River from the city limits of Natchez, Mississippi to the city limits of Vidalia, Louisiana. That said offshore drilling rig was owned by the libelee or respondent, Dixilyn Drilling Corporation, Inc., and was under [fol. 7] the exclusive control of the agents, servants and employees of the said Dixilyn Drilling Corporation, Inc., and said offshore drilling rig was being towed by three (3) tug boats under the exclusive control of the agents, servants and employees of the libelee or respondent, Crescent Towing and Salvage Company, Inc.; that the libelees' or respondents' agents, servants and employees were jointly in charge of and controlling the entire operation of the moving of the offshore drilling rig along the Mississippi River, on the Mississippi side thereof, at the time aforesaid, and while so doing were acting within the scope of their employment with the libelees or respondents and in the furtherance of the business of their respective masters or employers, the libelees.

Sixth: That as the said tug boats and offshore drilling rig or barge approached the Natchez-Vidalia Bridge, on the date mentioned in Paragraph Fifth hereof, the agents, servants and employees of Dixilyn Drilling Corporation, Inc., who were on board the said barge "Julia Anne", and whose duty it was to raise or lower the members or legs of said offshore drilling rig when required, negligently failed and neglected to lower one of the three (3) members or legs of said rig or barge a sufficient distance to clear the lower structure member of said bridge, and the agents, servants and employees of Crescent Towing and Salvage Company, Inc., on board the tugboats "Toltex", "Ouachita" and "Orleans" negligently failed to stop said barge when [fol. 8] it became apparent that the highest projected leg would strike the lower structure of the aforesaid bridge,

but permitted said barge to continue on its course down stream until said member or leg of the said offshore drilling rig or barge collided with the lower structure of said bridge, causing damages to said bridge as hereinafter set forth.

Seventh: The aforesaid collision and resulting damages as hereinafter described were not caused or contributed to by any fault or negligence on the part of the libelants, but were due wholly to and caused solely by the negligence of the libelees or respondents, through the neglect of their agents, servants and employees, in the following respects, among others which will be shown at the trial:

(1) The agents, servants and employees of the libelee or respondent, Dixilyn Drilling Corporation, Inc., failed and neglected to lower one of the members of the barge, "Julia Anne", a sufficient distance to clear the lower structure of the Natchez-Vidalia Bridge;

(2) The agents, servants and employees of the libelee or respondent, Crescent Towing and Salvage Company, Inc. did not have and maintain sufficient equipment to stop the movement of the offshore drilling rig when it became apparent that the same ~~could~~ not pass under the bridge without one of its vertical legs colliding with said bridge;

[fol. 9] (3) The agents, servants and employees of libelees or respondents did not take such steps as they could or should have taken to avoid the collision or mitigate the resulting damages.

Eighth: That in addition to the acts of negligence hereinafter set forth, libelants herein rely upon the doctrine of *res ipsa loquitur* to establish liability of the libelees or respondents for the damages hereinafter set forth.

Nineth: That the said offshore drilling rig, as it commenced passing under said bridge, violently collided with the lower chord of the upstream truss of the said bridge at the second span, on the Mississippi side of said river, between two (2) panels, seriously damaging two (2) mem-

bers of the lower chord; that said bridge was struck with great force and violence, and as a direct and proximate result of the aforesaid negligence the above described area of said bridge was damaged to such a degree as to create a condition that could likely cause danger to the entire bridge structure and to the traveling public of said bridge and river, and, in order to avoid and prevent further damages to said bridge and to the traveling public aforesaid, it was necessary that emergency steps be taken to repair said bridge.

Tenth: That said bridge was repaired under the supervision of the Mississippi State Highway Commission at a [fol. 10] cost to it of the sum of Forty-one Thousand Three Hundred Sixty-three and 24/100 Dollars ($41,363.24); that the costs aforesaid were necessary in order to restore the aforesaid bridge to the condition in which it existed immediately prior to the collision and to prevent further and more serious damages thereto.

Eleventh: The libelants bring this libel by virtue of the laws of the United States, and elect to have this suit proceed in accordance with the principles of libel in personam.

Twelfth: All and singular the premises are true and within the Admiralty and Maritime jurisdiction of this Honorable Court and of the United States.

Wherefore, libelants pray that process in due form of law according to the provisions of law may issue against the libelees or respondents herein and that they may be cited to appear and answer upon oath all and singular the matters aforesaid and that this Honorable Court may be pleased to decree that the libelants, or the libelant, Mississippi State Highway Commission, recover a judgment from and against the libelees or respondents in the full sum of Forty-one Thousand Three Hundred Sixty-three and 24/100 Dollars ($41,363.24), together with interest and costs; and that the libelants may have such other and further general re- [fol. 11] lief as a Court of Admiralty may deem proper in the premises.

Mississippi State Highway Commission, By: Attorney General of the State of Mississippi, Matthew Harper, Assistant Attorney General, of Counsel, Jackson, Mississippi;

City of Natchez, Mississippi, By: C. L. Collins, Attorney; 209 Fry Building, Natchez, Mississippi;

Department of Highways of the State of Louisiana, By: W. Crosby Pegus, Jr., D. Ross Banister, Philip K. Jones, and George W. Lester, of Counsel, By: C. L. Collins, of Counsel.

Duly sworn to by C. L. Collins, jurat omitted in printing.

[fol. 12]

IN THE UNITED STATES DISTRICT COURT

ANSWER OF DIXILYN DRILLING CORPORATION, LIBELEE AND RESPONDENT—Filed March 4, 1959

Now Comes Dixilyn Drilling Corporation, one of the libelees and respondents, in the above styled and numbered action, by its attorneys, and for answer to the libel filed and exhibited against it herein would show unto the Court the following:

[fol. 13] 1. Libelee and respondent, Dixilyn Drilling Corporation, admits the allegations of the First paragraph of the libel.

2. Libelee and respondent, Dixilyn Drilling Corporation, admits the allegations of the Second paragraph of the libel.

3. Libelee and respondent, Dixilyn Drilling Corporation, admits the allegations of the Third paragraph of the libel.

4. Libelee and respondent, Dixilyn Drilling Corporation, admits the allegations of the Fourth paragraph of the libel.

5. Libelee and respondent, Dixilyn Drilling Corporation, admits that on the early morning of December 27, 1957, a large, off-shore drilling rig owned by it and known as the "Julie Ann" was being towed by Crescent Towing & Salvage Co., Inc. upon the Mississippi River from Vicksburg, Mississippi, to the vicinity of New Orleans, Louisiana, but

Dixilyn Drilling Corporation denies that it was engaged in said towing operation, and would show unto the Court that said towing operation was under the sole and exclusive control of Crescent Towing & Salvage Co., Inc. which had sole and exclusive control over the movements of the "Julie Ann", and that the "Julie Ann" was not equipped with motive power to control its own movements but relied solely and exclusively on the tugs and/or towboats owned and [fol. 14] operated by Crescent Towing & Salvage Co., Inc. Said libelee and respondent, Dixilyn Drilling Corporation, denies that said off-shore drilling rig, at the time complained of, was under the exclusive control of the agents, servants and employees of Dixilyn Drilling Corporation, but admits that its said off-shore drilling rig was being towed by three boats which were under the exclusive control of the agents, servants and employees of Crescent Towing & Salvage Co., Inc. Said libelee and respondent, Dixilyn Drilling Corporation, denies that its agents, servants and employees were jointly in charge of and controlling the entire operation of the moving of the off-shore drilling rig along the Mississippi River, and would show that the moving of said drilling rig along the Mississippi River was under the sole and exclusive control of the agents, servants and employees of Crescent Towing & Salvage Co., Inc. Said libelee and respondent, Dixilyn Drilling Corporation, admits that it had employees on said off-shore drilling rig who would raise or lower the legs of said rig if and when instructed so to do by the agents, servants and employees of Crescent Towing & Salvage Co., Inc.

6. The libelee and respondent, Dixilyn Drilling Corporation, denies that as the tug boats and off-shore drilling rig approached the Natchez-Vidalia Bridge the agents, servants and employees of Dixilyn Drilling Corporation, who were on board the "Julie Ann" negligently failed and neglected to lower one of the three members or legs of said rig or [fol. 15] barge a sufficient distance to clear the lower structure member of said bridge, but would show unto the Court that the agents, servants and employees of Dixilyn Drilling Corporation, on the occasion complained of, followed and fully complied with the orders and instructions of the

agents, servants and employees of Crescent Towing & Salvage Co., Inc. in lowering the legs of said off-shore drilling rig. Said libelee and respondent, Dixilyn Drilling Corporation, admits that the agents, servants and employees of Crescent Towing & Salvage Co., Inc. failed to stop said barge and permitted said barge to continue on its course downstream until one member or leg of said off-shore drilling rig collided with the lower structure of said bridge.

7. Said libelee and respondent, Dixilyn Drilling Corporation, denies that said collision with said bridge and the resulting damages were due to or caused by any negligence of Dixilyn Drilling Corporation through the neglect of its agents, servants and employees. Said libelee and respondent, Dixilyn Drilling Corporation, denies that its agents, servants and employees failed and neglected to lower one of the members of the barge, "Julie Ann", a sufficient distance to clear the lower structure of the Natchez-Vidalia Bridge, and would show that its agents, servants and employees, in the lowering of the legs of said barge, were under the exclusive control of the agents, servants and employees of Crescent Towing & Salvage Co., Inc., and [fol. 16] that the agents, servants and employees of Dixilyn Drilling Corporation followed and fully complied with the orders and instructions of the agents, servants and employees of Crescent Towing & Salvage Co., Inc. with respect to the lowering of the legs of said barge prior to the collision complained of. Said Dixilyn Drilling Corporation would show that its servants, agents and employees were not allowed a reasonable or sufficient time by Crescent Towing & Salvage Co., Inc. to lower the legs of said barge after being instructed by the agents, servants and employees of Crescent Towing & Salvage Co., Inc. to do so. Said libelee and respondent, Dixilyn Drilling Corporation, further denies that the failure to lower a leg of said barge was a proximate cause of the collision and damage complained of. Said libelee and respondent, Dixilyn Drilling Corporation, admits, on information and belief, that the agents, servants and employees of Crescent Towing & Salvage Co., Inc. did not have and maintain sufficient equipment to stop the movement of the off-shore drilling rig

when it became apparent that same could not pass under the bridge without one of its vertical legs colliding with said bridge. Said libelee and respondent, Dixilyn Drilling Corporation, denies that its agents, servants and employees did not take such steps as they could or should have taken to avoid the collision or mitigate the resulting damages.

8. The libelee and respondent, Dixilyn Drilling Corporation, denies that the doctrine of res ipsa loquitur is ap- [fol. 17] plicable to establish liability against it for the damages complained of.

9. The libelee and respondent, Dixilyn Drilling Corporation, admits the allegations of the Ninth paragraph of the libel.

10. The libelee and respondent, Dixilyn Drilling Corporation, denies that the damage to said bridge amounted to the sum of $41,363.24, and denies that the expenditure of said amount was necessary in order to restore the aforesaid bridge to the condition in which it existed immediately prior to the collision or to prevent further and more serious damages thereto.

11. Libelee and respondent, Dixilyn Drilling Corporation, admits the allegations of the Eleventh paragraph of the libel.

12. Libelee and respondent, Dixilyn Drilling Corporation, admits the allegations of the Twelfth paragraph of the libel.

13. The libelee and respondent, Dixilyn Drilling Corporation, denies that libelants are entitled to recover the sum of $41,363.24 or any other amount from it.

14. The libelee and respondent, Dixilyn Drilling Corporation, would further show that it was guilty of no negligence which proximately contributed to the collision and damages complained of, and that said collision and damages constitute an inevitable accident in so far as the liability of the [fol. 18] libelee and respondent, Dixilyn Drilling Corporation, is concerned.

15. The libelee and respondent, Dixilyn Drilling Corporation, would show that at the time complained of Crescent Towing & Salvage Co., Inc. was acting as a common carrier by water within the meaning of Part III of the Interstate Commerce Act.

Wherefore, libelee and respondent, Dixilyn Drilling Corporation, having fully answered moves that the libel filed and exhibited against it herein be dismissed and denied and that it be fully and finally discharged from further liability herein.

Dixilyn Drilling Corporation, By: Watkins & Eager, By Thos. H. Watkins, Attorneys for Libelee and Respondent, Dixilyn Drilling Corporation.

Duly sworn to by Thos. H. Watkins, jurat omitted in printing.

[fol. 19]

IN THE UNITED STATES DISTRICT COURT

ANSWER OF CRESCENT TOWING & SALVAGE CO. INC.—
Filed March 27, 1959

To the Honorable the United States District Court for the Western Division of the Southern District of Mississippi; and the Honorable Judges Thereof:

The answer of Crescent Towing & Salvage Co. Inc. to the libel of Mississippi State Highway Commission, City of [fol. 20] Natchez, Mississippi and Department of Highways of the State of Louisiana, in a cause of collision, civil and maritime, with respect represents that:

1.

Respondent admits the allegations of Paragraph 1 of the libel.

2.

Respondent admits the allegations of Paragraph 2 of the libel except that it denies that its offices are located at 427 Balter Building, New Orleans, and denies that, at

the time of the collision described in the libel, it was using a public highway of the State of Mississippi and thereby designated the Secretary of State of Mississippi as its Agent for service of process.

3.

Respondent admits the allegations of Paragraph 3 of the libel.

4.

Respondent admits the allegations of Paragraph 4 of the libel.

5.

Respondent denies the allegations of Paragraph 5 of the libel, except as may be hereinafter specially admitted.

6.

Respondent denies the allegations of Paragraph 6 of the libel except as may be hereinafter specially admitted.

[fol. 21]

7.

Respondent denies the allegations of Paragraph 7 of the libel except insofar as such allegations charge negligence to Dixilyn Drilling Corporation and its agents, servants, employees and representatives.

8.

Respondent shows that Paragraph 8 of the libel set forth a conclusion of law and that no answer thereto is required, but if an answer be required, respondent denies the allegations of Paragraph 8 of the libel.

9.

Respondent denies the allegations of Paragraph 9 of the libel except as hereinafter admitted.

10.

Respondent denies the allegations of Article 10 of the libel and calls for strict proof thereof.

11.

Respondent shows that Paragraph 11 of the libel expresses a conclusion of law and that it requires no answer.

12.

Respondent admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court, but denies that the premises of the libel are true.

13.

Further answering the libel, respondent, Crescent Towing & Salvage Co. Inc. shows that at a date prior to [fol. 22] December 27, 1957, it entered into a contract with corespondent Dixilyn Drilling Corporation under and pursuant to the terms of which respondent agreed to furnish motive power to bring its non-self-propelled drilling barge Julie Ann from the plant of R. G. LeTourneau, Inc. at Vicksburg, Mississippi to New Orleans, Louisiana. Said drilling barge is a large, bulky structure, built in the shape of a triangle, two sides of which are approximately 194' in length and the third side of which is approximately 152' in length. The barge floats on a self-contained structure or pontoon, approximately 20' in depth. Mounted upon the deck of the pontoon or barge is all of the crew housing facilities, equipment and machinery necessary to operate the said barge as a self-contained platform for the purpose of drilling for oil or gas under the bed of a body of water. The barge is fitted with three legs approximately 175' in length, which legs, when fully elevated, extend approximately 155' over the deck of the barge, and affixed to the bottom of each of which is a large cylindrical steel drum or pontoon approximately 20' in diameter and approximately 20' in height. The Barge Julie Ann had been newly constructed by R. G. LeTourneau Company at Vicksburg, at a cost that respondent is informed and believes

and so alleges was in excess of one million dollars. Although the said barge had no motive power, it was equipped with a great deal of complex machinery and equipment, which required highly specialized knowledge for its [fol. 23] proper operation. Included in such machinery were the motors, gears and controls for raising and lowering the legs of the barge. Accordingly, during the trip downriver, the barge was manned and controlled by a crew of specialists in the operation of the barge's machinery, equipment and controls, said crew at all times being in the employ and acting solely for and on behalf of Dixilyn Drilling Corporation.

Prior to making up the tow so that the barge could be moved downriver, a towing bar or knee was installed by R. G. LeTourneau Company or Dixilyn Drilling Corporation across the keyway at the stern of the barge. In the presence of representatives of Dixilyn Drilling Corporation and with their approval, the tug Toltec, the tug Ouachita and the tug Orleans made up to the face of the bar. The said tugs, the makeup of the tow and all arrangements for the movement were approved in advance by representatives of Dixilyn Drilling Corporation.

Respondent admits that one of the legs of the Julie Ann struck the under side of the Natchez-Vidalia Bridge when it was being moved downriver. Respondent particularly denies that it or any of its agents, servants, employees or representatives, whether under its dominion and control or acting as borrowed servants and employees for Dixilyn Drilling Corporation, had any responsibility or jurisdiction over the maneuvering of the barge and/or the legs thereof; [fol. 24] and that the damage to the Bridge was caused solely and only by the negligence, lack of care and inattentiveness to duty exhibited by the agents, servants and employees of Dixilyn Drilling Corporation and the crew of the barge Julie Ann in failing properly and promptly to lower the legs of the barge so that a clearance under the lower side of the Bridge would be insured at the time that the barge was passing under the Bridge.

Respondent shows that under and pursuant to the terms of the contract entered into by and between Dixilyn Drilling Corporation and this respondent, the master, pilot and

crew of the tugs and all agents, servants, employees and representatives of this respondent were agreed to be the servants of the barge and its owners, and if they, or any of them, were negligent in any respect, which is denied, then this respondent, under the terms of its contract with Dixilyn Drilling Corporation, is not and may not be held liable for the damages sustained by the Bridge.

Wherefore respondent prays that it may be dismissed hence at libelant's cost.

And for such other and further relief as may be proper in this cause and this Honorable Court competent to grant.

Brunini, Everett, Grantham & Quin, By Billy H. Quin, First National Bank Building, Vicksburg, Mississippi;

[fol. 25]

Lemle & Kelleher, By Charles Kohlmeyer, Jr., 1836 National Bank of Commerce Bldg., New Orleans, Louisiana;

Proctors for Crescent Towing & Salvage Co. Inc., Respondent.

Duly sworn to by Billy H. Quin, jurat omitted in printing.

[fol. 26]

IN THE UNITED STATES DISTRICT COURT

PETITION OF CRESCENT TOWING & SALVAGE CO., INC.— Filed March 27, 1959

To the Honorable the United States District Court for the Western Division of the Southern District of Mississippi; and the Honorable Judges Thereof:

The petition of Crescent Towing & Salvage Co. Inc. filed under the 56th Admiralty Rule promulgated by the United States Supreme Court against Dixilyn Drilling Corporation, Inc., in a cause of collision, civil and maritime, with respect represents that:

1.

At all times hereinafter mentioned, petitioner Crescent Towing & Salvage Co. Inc. was and now is a corporation organized under the laws of Louisiana with its offices and principal place of business in New Orleans.

2.

At all times hereinafter mentioned, respondent-impleaded, Dixilyn Drilling Corporation, was and still is a corporation organized under the laws of the State of Delaware, authorized to do and doing business in the State of Mississippi with offices and a resident agent for service of process located in Jackson, Hinds County, Mississippi.

[fol. 27]

3.

On or about December 22, 1958 a libel was filed herein by Mississippi State Highway Commission, City of Natchez, Mississippi, and Department of Highways, State of Louisiana, as owners of the Natchez-Vidalia Bridge over the Mississippi River at or near Natchez, Mississippi, against Dixilyn Drilling Corporation and petitioner herein, alleging that the said bridge had been damaged to the extent of $41,363.24 by the negligence of either or both respondents, and seeking a recovery of said sum with interest and costs. Petitioner files this 56th Rule Petition simultaneously with the filing of its answer to the said libel.

4.

In the early part of December, 1957, petitioner was contacted by officials of Dixilyn Drilling Corporation (hereinafter referred to as respondent) and after negotiations, entered into an oral contract with respondent, confirmed by letters, under and pursuant to the terms of which petitioner agreed to furnish motive power to bring respondent's non-self-propelled drilling barge Julie Ann from the plant of R. G. LeTourneau, Inc. at Vicksburg, Mississippi to New Orleans, Louisiana, for a fixed and stated consideration, based upon the release and indemnification clauses and the insuring agreements incorporated

therein and hereinafter referred to. Said drilling barge is a large bulky structure, built in the shape of a triangle, two [fol. 28] sides of which are approximately 194′ in length and the third side of which is approximately 152′ in length. The barge floats on a self-contained structure or pontoon; approximately 20′ in depth. Mounted upon the deck of the pontoon or barge is all of the crew housing facilities, equipment and machinery necessary to operate the said barge as a self-contained platform for the purpose of drilling for oil or gas under the bed of a body of water. The barge is fitted with three legs approximately 175′ in length, which legs, when fully elevated, extend approximately 155′ over the deck of the barge, and affixed to the bottom of each of which is a large cylindrical steel drum or pontoon approximately 20′ in diameter and approximately 20′ in height. The barge Julie Ann had been newly constructed by R. G. LeTourneau Company at Vicksburg, at a cost that respondent is informed and believes and so alleges was in excess of one million dollars. Although the said barge had no motive power, it was equipped with a great deal of complex machinery and equipment which required highly specialized knowledge for its proper operation. Included in such machinery were the motors, gears and controls for raising and lowering the legs of the barge. Accordingly, during the trip downriver, the barge was manned and controlled by a crew of specialists in the operation of the barge's machinery, equipment and controls, said crew at all times being in the employ and acting solely for and on behalf of Dixilyn Drilling Corporation.

[fol. 29] 5.

Recognizing the fact that the barge presented unusual problems of towing, and that the movement of the barge along the River in the traffic and with the current running at the time when the proposed move was to take place was extremely hazardous, petitioner agreed to undertake the move but only on condition that it would furnish the motive power therefor, its master, agents, servants and employees to become and be, for the purposes of the towage, the agents, servants, employees and representatives of respon-

dent. Petitioner further advised respondent that it would not tow the barge or cause it to be moved unless it was relieved and released from all liability incident thereto and was indemnified for all damages which might arise out of the move or towage, including claims urged by third parties. Respondent agreed to these conditions. That portion of said agreement was evidenced by two letters, one dated December 19 and the other dated December 23, 1957, and was approved by respondent through Russell V. Tidwell and others, all duly authorized to give approval for account of respondent. It was further understood and agreed therein that full insurance for protection against all risks, including the risk of damage to any bridge or fixed structure, was to be procured by respondent at its own expense and that such insurance would enure to the benefit of petitioner. Petitioner attaches copies of the said [fol. 30] letters hereto as Exhibits A and B, and makes them part hereof as if fully copied herein.

6.

Under and pursuant to the agreement so made with respondent, petitioner furnished the Tugs Orleans, Toltec and Ouachita for the movement. Said tugs were described to respondent, and respondent, through its authorized representatives, agreed that the tugs were satisfactory in all respects to perform the contemplated work. At the same conference between the parties, it was agreed that a thirty foot length would be removed from each leg so as to make the barge more maneuverable during its movement, although petitioner asked that sixty feet of each leg be removed.

7.

On or about December 28, 1957, pursuant to the said agreement, the three tugs arrived at the LeTourneau Plant at Vicksburg. Prior to making up the tow, a towing bar or knee was installed by R. G. LeTourneau Company or Dixilyn Drilling Corporation across the keyway at the stern of the barge. In the presence of representatives of Dixilyn Drilling Corporation and with their approval, the tug Toltec,

the tug Ouachita and the tug Orleans made up to the face of the bar. The makeup of the tow and all arrangements for the movement were approved by representatives of Dixilyn Drilling Corporation. Early in the morning of December 26, the tugs commenced pushing the barge down-[fol. 31] stream to a point above Natchez, where the legs of the barge were lowered and the flotilla tied up for the night. On the following morning, with the United States Engineers' pilot boat Orleans sailing ahead of the flotilla and advising as to water depths, the flotilla proceeded downstream to a point just above the Natchez-Vidalia Bridge. The tugs thereupon so maneuvered the barge as to face it upstream, with the stern of the tugs faced downstream in order to develop the maximum power to hold the barge up in the current. At an agreed signal, the agents, servants, employees and representatives of respondent started to let down the legs of the barge so as to permit the flotilla to pass under the Bridge. Prior to executing this maneuver, the clearance between the surface of the water and the lowest point of the Bridge had been ascertained, and the depths of the water in the approaches to the Bridge had likewise been ascertained. Petitioner shows that it accordingly used all due precaution and expert seamanship in preparing to pass under the Bridge.

8.

No one on board the barge other than the agents, servants, employees and representatives of respondent was charged with the duty of raising and lowering her legs. The only person on board the barge in the general employ of petitioner was Captain Brechtel, the master of petitioner's tug Orleans, who, under the contract with respondent, was the borrowed servant or representative of [fol. 32] respondent. However, he had nothing to do with the raising or lowering of the legs, whether as to the mechanics thereof or as to the timing of their movements.

9.

Through the negligence, want of care and inattentiveness to duty on the part of respondent's agents, servants, em-

ployees and representatives charged with the timing and the mechanics of raising and lowering the legs of the barge, instead of permitting all legs to be let down so as to clear the under side of the Bridge, they permitted one leg to remain in a position where its top struck the under side of the Bridge and caused the damages complained of herein. Petitioner is informed and believes and so alleges that the reason the leg failed to clear, among others, was that the depth of said leg was misread or incorrectly reported to the room where it was controlled. At the last moment before the leg was passing under the Bridge, the fact that the draft reading was erroneous was discovered, but at that time it was too late to stop or do anything to prevent the collision.

10.

Nothing which petitioner or any of its agents, servants or employees did or could have done in any way caused or contributed to the collision which, on the contrary, was caused solely and only by the fault, neglect and errors of omission and commision of the master and members of the [fol. 33] crew of the barge Julie Ann, and other agents, servants, employees and representatives of respondent in failing properly and promptly to control the legs so as to cause them to be let down in time to permit the rig to clear the under side of the Bridge.

11.

Petitioner shows that in the event that it is cast for any damages in the premises, it is entitled as a matter of law and by virtue of its contract to be indemnified and reimbursed by respondent for such damages; and petitioner further shows that, by virtue of the breach of the contract to indemnify it and procure insurance for its account, petitioner has been required to retain attorneys and will be required to pay their fees and the costs of defending this action, petitioner having heretofore called upon respondent to take over the defense of the claim and that call having been denied. Petitioner avers on information and belief

that the reasonable attorney's fees and costs incident to the defense of this claim will amount to $15,000, for which sum respondent is liable to petitioner.

12.

All and singular the premises of this 56th Rule Petition are true and correct and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Wherefore, Crescent Towing & Salvage Co. Inc., petitioner, prays that process according to law and the course [fol. 34] and practice of this Honorable Court issue herein against Dixilyn Drilling Corporation, citing it to appear and answer hereto under oath; and that, after due proceedings had and legal delays, there be a decree herein in favor of petitioner and against respondent, Dixilyn Drilling Corporation, decreeing respondent liable over to petitioner for any amount for which petitioner may be cast in any decree entered herein, and for the further amount of $15,000 or such other amount as this Honorable Court may decree petitioner entitled to for its costs and attorney's fees incurred in defending this action.

And for such other and further relief as this Court is competent to give and as may be meet and proper in the premises.

Brunini, Everett, Grantham & Quin, By Billy H. Quin, First National Bank Building, Vicksburg, Mississippi;

Lemle & Kelleher, By Charles Kohlmeyer, Jr., 1836 National Bank of Commerce Bldg., New Orleans, Louisiana;

Proctors for Crescent Towing & Salvage Co. Inc., Petitioner.

Duly sworn to by Billy H. Quin, jurat omitted in printing.

[fol. 36]

EXHIBIT "A" TO PETITION

CRESCENT TOWING & SALVAGE CO., INC.
General Towing — Salvage Operations
625 Hibernia Bank Building
New Orleans 12, La.

Phone
Day or Night
FOrest 6-1521

Cable Address
"CRESTOWSAL"

OPERATING TUGS:
Humrick — Lillian
Port Allen — Port Hudson
William S. Smith
Sandra — Ocean Prince
Orleans

December 19, 1957

Dixilyn Drilling Corp.
Saratoga Building
New Orleans, Louisiana.

Attention: Mr. H. Brighan
Executive Vice President

Subj: "JULIE ANN" From Vicksburg
December 26th, 1957

Gentlemen:

We wish to confirm our recent conversation including Mr. M. O. Boring, Jr. and Mr. Mike Smith, in which we discussed the towing of the "JULIE ANN" from Vicksburg to our Fleet Landing in the New Orleans harbor.

We understand that the "JULIE ANN" will be ready to leave Vicksburg the morning of December 26th and we expect to be in Vicksburg ready to move her at that time; we contemplate using two river pushboats (towboats) of substantial horsepower and one tug boat. For the trip from New Orleans to her offshore location, seagoing tugboats will be used.

[fol. 37] This tow will be performed by Crescent subject to towage release clause, copy of which is attached and is

part of our agreement with you; it being mutually understood and agreed that in consideration of including this clause lower rates prevail. It is also necessary that we (Crescent Towing & Salvage Co., Inc.) be included in the "JULIE ANN" hull and P & I Insurance coverage and we will appreciate receiving a letter or telegram from your underwriters or brokers to this effect as soon as possible.

We will continue to keep in touch with your office and know that you will advise us if there is any change in the anticipated readiness of the rig at Vicksburg. We appreciate very much your calling upon us to tow the "JULIE ANN".

Very truly yours,

CRESCENT TOWING & SALVAGE CO., INC.

BY /s/ WARREN C. APGAR
VICE PRESIDENT.

WCA:m

Encl. (1)

cc—Mr. Pic
Rate files

TOWER'S RELEASE CLAUSE
(ATTACHED TO EXHIBIT "A")

All towage will be performed solely at the risk of the craft towed and its cargo, including the risk of negligence of the master, pilot and crew of the towing craft and our employees, agents and representatives, all of whom in [fol. 38] respect to the towage shall become and be the servants of the craft towed and its owners and operators; provided that nothing herein contained shall be construed as making the craft towed, its owners or operators, liable or responsible for loss of or damage to the towing craft or property owned by third parties or for loss of life or personal injury for which the craft towed, its owners or operators, would not otherwise be liable or responsible.

Neither we nor the towing craft nor its owners or operators shall be liable, and the craft towed and its owners and operators shall hold us and the towing craft and its owners and operators harmless from any liability, for any loss of or damage to the craft towed and its cargo from any cause whatsoever, including loss or damage caused by negligence of the master, pilot and crew of the towing craft and our employees, agents and representative. We reserve the right to tow all vessels singly or with other craft and to change craft towed from one to another tow as frequently as we may find it convenient to do so. Release of craft to be towed to any vessel owned or used by us for towage shall be conclusive evidence of the acceptance of these conditions.

[fol. 39]

EXHIBIT "B" TO PETITION

CRESCENT TOWING & SALVAGE CO., INC.
General Towing — Salvage Operations
625 Hibernia Bank Building
New Orleans 12, La.

Phone
Day or Night
FOrest 6-1521

Cable Address
"CRESTOWSAL"

OPERATING TUGS:
Humrick — Lillian
Port Allen — Port Hudson
William S. Smith
Sandra — Ocean Prince
Orleans

December 23, 1957

Dixilyn Drilling Corporation
Saratoga Building
New Orleans, Louisiana.

Gentlemen:

With further reference to our undertaking to tow your drilling barge JULIE ANN from Vicksburg to our Fleet Landing in New Orleans and then down the Mississippi River into the Gulf, we confirm that the following addi-

tional clause shall be included in the contract as part of the consideration for our undertaking the towage:

It is particularly understood and agreed that you are authorized to and by this agreement do release and relieve us from any liability for account of your underwriters and that any damage claims urged by third parties as well as any claim which may be urged by virtue of damage to the drilling rig in the course of the towage shall be for your account and account of your underwriters.

It is further understood that the amount of the insurance protection which you have in force equals the value of the hull of the barge as to hull insurance and amounts to four [fol. 40] million dollars as to third party claims.

If the foregoing meets with your approval and represents this portion of our agreement, please sign and return to us the attached three copies of this letter, retaining the original and the other copy for your files.

Very truly yours,

CRESCENT TOWING & SALVAGE CO., INC.

BY /S/ WARREN C. APGAR
VICE PRESIDENT.

WCA:m

APPROVED:

Dixilyn Drilling Corporation

BY: /S/ RUSSELL V. TIDWELL

IN THE UNITED STATES DISTRICT COURT

ANSWER OF DIXILYN DRILLING CORPORATION, AS RESPONDENT, TO PETITION OF CRESCENT TOWING & SALVAGE CO., INC.—Filed April 13, 1959

Now Comes Dixilyn Drilling Corporation, one of the libelees and respondents in the above styled and numbered action, by its attorneys, and for answer to the petition exhibited against it herein by Crescent Towing & Salvage Co., Inc. would show unto the Court the following:

1. Respondent admits the allegations of paragraph 1 of said petition.

2. Respondent admits the allegations of paragraph 2 of said petition.

{fol. 41} 3. Respondent admits the allegations of paragraph 3 of said petition.

4. Said respondent admits that in December, 1957, it entered into an agreement with Crescent Towing & Salvage Co., Inc. whereby said company undertook to transport respondent's drilling barge, the Julie Ann from the plant of R. G. LeTourneau, Inc. at Vicksburg, Mississippi, to New Orleans, Louisiana, for a fixed and stated consideration, but denies that same was based upon any alleged release and indemnification clauses or insuring agreements. Said respondent admits that the description of the drilling barge, the Julie Ann, as contained in paragraph 4 of the petition is substantially correct, but denies that respondent's crew aboard the Julie Ann were at all times in the employ and acting solely and on behalf of respondent, and would show unto the Court that respondent's crew raised or lowered the legs of the Julie Ann solely and entirely on instructions of the agents, servants, and employees of Crescent Towing & Salvage Company, Inc. who had complete supervision over the tugs operated by Crescent Towing & Salvage Co., Inc. and the raising and lowering of the legs of the Julie Ann.

5. Said respondent admits that Crescent Towing & Salvage Co., Inc. recognized that the movement of the Julie

Ann down the river presented unusual problems and was extremely hazardous, but said respondent denies that Crescent Towing & Salvage Co., Inc. agreed to undertake the [fol. 42] move only on condition that it would furnish the motive power and on condition that its master, agents, servants and employees were to become and be, for the purposes of the towage, the agents, servants, employees and representatives of said respondent. Said respondent denies that Crescent Towing & Salvage Co., Inc. advised it that it would not tow the barge or cause it to be towed unless it was relieved and released from all liability incident thereto and was indemnified for all damages which might arise out of the move or towage, including claims urged by third parties. Said respondent denies that it agreed to said conditions, and would show unto the Court that if any such agreement had been made, which is denied, same would constitute an agreement attempting to relieve Crescent Towing & Salvage Co., Inc. of the responsibility for its own negligence, and that any such agreement would be contrary to public policy, void and unenforceable. Said respondent admits that it received the letter dated December 19, 1957, Exhibit "A" to the petition, and the letter dated December 23, 1957, Exhibit "B" to the petition, but denies that the said Russell V. Tidwell had any authority under the law to enter into the type of agreement as construed and alleged by petitioner in paragraph 5 of the petition. Said respondent denies that it was further understood and agreed that full insurance for protection against all risks, including the risk of damage to any bridge or fixed structure was to be procured by respondent at its own expense [fol. 43] and that such insurance would enure to the benefit of petitioner. Said respondent would further show that if any such agreement had been made, which is denied, same would have constituted an attempt on the part of petitioner to be relieved from the effect of its own negligence and that any such agreement would be contrary to public policy, void and unenforceable.

6. Said respondent admits that petitioner furnished the tugs, Orleans, Toltec and Ouachita for the movement, but denies that same were furnished pursuant to the alleged

agreement as stated and construed by petitioner in paragraph 5 of the petition. Respondent would show that it relied entirely on petitioner in its selection of tugs which it believed to be adequate for the movement of the Julie Ann down the Mississippi River, and denies that respondent, through its authorized representatives, agreed that the tugs were satisfactory in all respects to perform the contemplated work. Respondent relied entirely on the judgment of petitioner with respect to petitioner's use of said tugs.

7. Said respondent admits that on or about December 28, 1957, said three tugs arrived at the LeTorneau Plant for the purpose of making up the tow. Respondent denies that its representatives either approved or disapproved the use of said three tugs by petitioner but left the question of the adequacy of said tugs entirely to the discretion of petitioner, and that the use of said three tugs was the sole [fol. 44] decision of petitioner. Respondent denies that the makeup of the tow and all arrangements for the movement were approved by representatives of respondent, and would show that the makeup of the tow and all arrangements for the movement were solely the result of decisions made by petitioner. Respondent admits that petitioner's three tugs were attempting to control the movements of the Julie Ann at a time when it was a short distance upstream from the Natchez-Vidalia Bridge. Respondent admits that the agents, servants, employees and representatives of petitioner made the decision as to when the legs of the barge were to be lowered so as to permit the flotilla to pass under the bridge, and denies that the agents, servants, employees and representatives of respondent, Dixilyn Drilling Corporation, had anything to do with the movement of the legs other than to raise or lower same as directed by the agents, servants and employees of the petitioner, Crescent Towing & Salvage Co., Inc. Respondent denies that its agents, servants or employees were furnished any information with respect to the clearance between the surface of the water and the lowest point of the bridge or the depths of the water in the approaches to the bridge. Respondent denies that petitioner used all due precaution and expert seamanship in

prepafing to pass under the bridge, and would show that petitioner did not have and maintain sufficient tugs and equipment to control the movement of the Julie Ann and [fol. 45] did not have and maintain sufficient tugs and equipment to stop the movement of the Julie Ann when it became apparent that same could not pass under the bridge without one of its vertical legs colliding with said bridge. Respondent would further show that petitioner, at no time prior to the collision, gave respondent notice of the fact that it had not furnished sufficient tugs and equipment to control the Julie Ann and wholly failed to order the legs of the Julie Ann lowered in sufficient time for same to pass under the bridge without striking the bridge. Respondent would further show that the insufficiency of the tugs and equipment furnished by petitioner in attempting to move the Julie Ann under the Natchez-Vidalia Bridge was conceded by petitioner in that it used a fourth tug in addition to the other three, in controlling the movement of the Julie Ann when it subsequently passed under the bridge across the Mississippi River at Baton Rouge, Louisiana. Petitioner was further guilty of negligence in failing to properly test the tugs and equipment required to control the movements of the Julie Ann before beginning said moving operation. Respondent would show that said negligence on the part of petitioner was the sole proximate cause of the resulting collision between one leg of the Julie Ann and said bridge.

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8. Respondent denies that no one on board the Julie Ann other than the agents, servants, employees and representatives of respondent was charged with the duty of raising [fol. 46] and lowering her legs, and respondent would show that the raising and lowering of the legs of the Julie Ann were controlled exclusively by the agents, servants, employees and representatives of the petitioner. Respondent denies that the only person on board the Julie Ann in the general employ of petitioner was Captain Brechtel, the master of petitioner's tug Orleans, and denies that said Captain Brechtel, under the contract with respondent, was the borrowed servant or representative of respondent. Respondent denies that Captain Brechtel had nothing to do

with the raising or lowering of the legs, and respondent would show that he and other representatives of the petitioner exercised exclusive control over the decisions as to when the legs would be raised or lowered.

9. Respondent denies that through negligence, want of care and inattentiveness to duty on the part of respondent's agents, servants, employees and representatives they permitted one leg to remain in a position where its top struck the underside of said bridge, and respondent denies that its agents, servants and employees and representatives were charged with the timing and mechanics of raising and lowering the legs of the Julie Ann and would show that they followed the instructions of the agents, servants, employees and representatives of the petitioner in raising or lowering said legs. Respondent denies that the reason the leg failed to clear was that the depth of said leg was mis-read or [fol. 47] incorrectly reported to the room where it was controlled, and respondent would show that the reason the leg failed to clear was the delay on the part of petitioner's agents, servants, employees and representatives in ordering the legs lowered and the inability of petitioner's tugs to control the movement of the Julie Ann in order for the legs to be after petitioner's decision to lower same. Respondent denies that at the last moment before the leg was passing under the bridge the alleged fact that the draft reading was erroneous was discovered and denies that at that time it was too late to stop or do anything to prevent the collision.

10. Respondent denies that nothing which petitioner, or any of its agents, servants or employees did or could have done in any way caused or contributed to the collision, and would show that the negligence of the agents, servants and employees of petitioner, as hereinabove set out, was the sole proximate cause of said collision. Respondent denies that said collision was caused solely and only by the fault, neglect and errors of omission and commission of the master and members of the crew of the Julie Ann and other agents, employees and representatives of respondent in failing properly and promptly to control the legs so as to cause them to be let down in time to permit the rig to clear the underside of the bridge.

11. Respondent denies that in the event petitioner is assessed with damages in this action, it is entitled as a [fol. 48] matter of law and by virtue of its contract to be indemnified and reimbursed by respondent for such damages. Respondent denies that it has breached its contract with petitioner and would show that the alleged contract to indemnify petitioner and procure insurance for its account is not susceptible to the interpretation placed on it by petitioner, and if susceptible to such interpretation, such contract is contrary to public policy, void and unenforceable as an attempt on the part of petitioner to avoid the results of its negligence. Respondent denies that it is in any way liable to petitioner in this action, and denies that it is liable to petitioner in an amount to cover petitioner's attorneys' fees in the amount of $15,000.00 or any other amount.

12. Respondent denies that the allegations of the petition filed under Rule 56 are true and correct and denies that petitioner is entitled to recover any amount of or from the respondent in this action, and that the petition should be dismissed at the cost of petitioner with a reasonable allowance to respondent and against petitioner for respondent's expense and attorneys' fees in defending same.

Watkins & Eager, 800 Plaza Building; Jackson, Mississippi, By Thos. H. Watkins, Attorneys for Dixilyn Drilling Corporation.

[fol. 49] *Duly sworn to by Thos. H. Watkins, jurat omitted in printing.*

[fol. 50]

IN THE UNITED STATES DISTRICT COURT

ANSWER OF MISSISSIPPI STATE HIGHWAY COMMISSION, CITY OF NATCHEZ, MISSISSIPPI AND DEPARTMENT OF HIGHWAYS OF THE STATE OF LOUISIANA TO PETITION OF CRESCENT TOWING & SALVAGE CO., INC.—Filed April 22, 1959

Now come Mississippi State Highway Commission, City of Natchez, Mississippi and Department of Highways of the State of Louisiana, libelants in the above styled and numbered action, by their attorneys, and for answer to the petition of Crescent Towing & Salvage Co., Inc. state unto the Court as follows:

1. Libelants admit the allegations of paragraph 1 of said petition.

2. Libelants admit the allegations of paragraph 2 of said petition.

3. Libelants admit the allegations of paragraph 3 of said petition.

4. Libelants admit all the allegations of paragraph 4 of said petition that are consistent with the allegations of the original libel of these libelants, and as to all other allegations contained in said paragraph 4 of the petition, the libelants are without sufficient information or knowledge to answer such, but for the purpose of requiring strict proof on the part of the defendant and third party plaintiff, Crescent Towing & Salvage Company, Inc., deny the same.

5. Libelants are without sufficient information and knowledge to truthfully answer the allegations of paragraph [fol. 51] 5 of the petition, but for the purpose of requiring strict proof deny the same.

6. As to paragraph 6 of the petition, the libelants herein are without sufficient knowledge or information to truthfully answer the allegations thereof, and for the purpose of requiring strict proof the same are denied.

7. All allegations of paragraph 7 of the petition that are consistent with the allegations of the libel are admitted,

but all allegations of paragraph 7 of the petition stating facts contrary to the allegations of the libel are denied; as to all other allegations contained in paragraph 7 of the petition the libelants are without sufficient information or knowledge to truthfully answer the same, but for the purpose of requiring strict proof thereof the same are denied.

8. The allegations of paragraph 8 of the petition are denied.

9. The allegations of paragraph 9 of the petition are admitted, but libelants show that the agents, servants, employees and representatives of the defendant and third party plaintiff were also negligent in the operation of its tug boats and in the towing and controlling of the drilling barge, Julie Ann.

10. The allegations of paragraph 10 of the petition are denied except the allegations as to the failure to lower the legs of the barge, Julie Ann, so as to cause them to be [fol. 52] let down in time to permit the rig to clear the underside of the bridge, which allegation is admitted.

11. Libelants show that paragraph 11 of the petition expresses a conclusion of law and fact and that it requires no answer on the part of the libelants herein.

12. Libelants deny that all and singular the premises of 56th Rule Petition are true and correct but admit that the same are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court. Libelants do not deem it necessary to answer any other allegation contained in paragraph 12 of the aforesaid petition.

13. Further answering the petition and any affirmative defense heretofore asserted by defendants, the libelants hereby adopt, by special reference, all and singular the premises and allegations contained in the libel.

Mississippi State Highway Commission, By: Attorney General of the State of Mississippi, Matthew Harper, Assistant Attorney General, of Counsel, Jackson, Mississippi;

City of Natchez, Mississippi, By: C. L. Collins, Attorney, 209 Fry Building, Natchez, Mississippi;

Department of Highways of the State of Louisiana, [fol. 53] By: W. Crosby Pegus, Jr., D. Ross Banister, Philip K. Jones, and George W. Lester, of Counsel, By: C. L. Collins, of Counsel.

Duly sworn to by C. L. Collins, jurat omitted in printing.

[fol. 54]

IN THE UNITED STATES DISTRICT COURT

ORDER APPROVING STIPULATION—November 19, 1959

This day this action came on for hearing on the motion of Libelants for an order of this Court adopting, approving, ratifying and confirming a wri n agreement and stipulation made and signed by the Attorneys for all parties herein, and the Court having considered the same is of the opinion that said motion should be sustained.

It Is Therefore Ordered, Adjudged and Decreed that the written stipulation setting forth admissions and agreements of Attorneys for all parties, hereto attached to this order, marked Exhibit "A" and made a part hereof for all purposes, be, and the same is, hereby adopted, approved, ratified and confirmed by this Court.

Ordered, Adjudged and Decreed this 19th day of November, 1959.

S. C. Mize, U. S. District Judge.

Filed and entered OB 1959, Page 197

[fol. 55]

EXHIBIT A TO ORDER

STIPULATION SETTING FORTH ADMISSIONS OR AGREEMENTS OF ATTORNEYS FOR ALL PARTIES—Filed November 19, 1959

At 1:30 o'clock P. M., June 11, 1959 in the Federal Courthouse in Biloxi, Mississippi, Honorable Judge Sidney Mize held a pre-trial conference in the above styled and numbered cause and there were present at said hearing Tom Watkins of the firm of Watkins & Eager, Jackson, Mississippi, and Charles Kohlmeyer of the firm of Lemle & Kelleher of New Orleans, Louisana, attorneys for libelees, and C. L. Collins of Natchez, Mississippi, attorney for libelants.

This hearing resulted in an agreement by all of the aforesaid attorneys that libelants had suffered damages to the Natchez-Vidalia bridge, as described in the Complaint in this cause, in the total sum of Forty One Thousand, Three Hundred Sixty Three and 24/100 ($41,363.24) Dollars, and have paid said sum in the repair thereof, and said libelants are entitled to a judgment for the aforesaid amount, together with interest and costs, against such party or parties as the Courts may finally determine to be liable therefor.

It is further stipulated and agreed that the Libelees could not agree upon the question of their respective liability or liabilities, nor has either admitted any liability whatsoever for the damages hereinabove described; that neither of the libelees have admitted any negligence on their part for the cause of the aforesaid damages and, hence, it is [fol. 56] necessary to litigate, as between themselves, the question or questions of their respective negligence or liability to a conclusion unless at some later date they may resolve their differences by agreement. Accordingly, nothing herein contained shall be deemed to affect the Third Party libel or complaint of Crescent Towing & Salvage Company, Inc. or the matters presented by the pleadings on this phase of this case.

It is further stipulated and agreed that the libelants shall not be required to make any further proof as to liability or

damage in this cause, but the libelees, as between themselves, may litigate to a final conclusion all questions of negligence, liability, contribution, indemnity and ultimate responsibility on the part of each or both of the libelees.

It is further stipulated and agreed that, notwithstanding anything contained herein to the contrary, libelants may, in their discretion, appear at all hearings hereon and offer such proof and make such objections as they may deem proper and necessary, and they may likewise cross-examine any witness on behalf of either of the libelees and, in their option, prosecute this cause to a final conclusion.

It is further stipulated and agreed that the Court may render judgment upon the pleadings against either or both of the libelees and assess damages in such proportion or proportions as the Court may find and determine their [fol. 57] liability or liabilities to be thereunder after a hearing on the case to the same extent as if libelants had proved the claim herein presented.

Stipulated and Agreed this the 11th day of June, 1959.

Watkins & Eager, Attorneys for Dixilyn Drilling Corporation, Libelee, By Tom Watkins, of Counsel;

Brunini, Everett, Grantham & Quin;
Lemle & Kelleher, Attorneys for Crescent Towing & Salvage Company, Inc., Libelee, By Charles Kohlmeyer, Jr., of Counsel.

George W. Lester, Attorney for Department of Highways of the State of Louisiana, Libelant;

Matthew Harper, Assistant Attorney General, Attorney for Mississippi State Highway Commission, Libelant;

C. L. Collins, Attorney for City of Natchez, Mississippi, Libelant, By C. L. Collins, of Counsel.

[fol. 58]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

No. 871 in Admiralty

MISSISSIPPI STATE HIGHWAY COMMISSION,
CITY OF NATCHEZ, MISSISSIPPI,

—and—

DEPARTMENT OF HIGHWAYS OF THE STATE OF LOUISIANA,
Libelants,

vs.

DIXILYN DRILLING CORPORATION

—and—

CRESCENT TOWING & SALVAGE CO., INC.,
Libelees and Respondents.

Transcript of Evidence

APPEARANCES:

Honorable C. L. Collins, 209 Fry Building, Natchez, Mississippi, For Libelants.

Honorable Thomas H. Watkins of the firm of Watkins & Eager, Jackson, Mississippi; and

Honorable E. D. Vickery of the firm of Royston, Rayzor & Cook, Houston, Texas;

Honorable Charles Kohlmeyer, Jr. of the firm of Lemle & Kelleher, New Orleans, La.;

Honorable William G. Beanland and

Honorable Billy H. Quin of the firm of Brunini, Everett, Grantham & Quin, Vicksburg, Mississippi, For Libelees and Respondents.

Be It Remembered that on, to-wit, Monday, the 28th day of March, 1960, the above-entitled cause came on for hearing before the Honorable S. C. Mize, United States Judge for the Southern District of Mississippi, at Vicksburg, Mississippi, in the Western Division, and the following testimony and proceedings were had:

* * * * * * * * *

[fol. 116] Mr. Kohlmeyer: I think there is in the courtroom Mr. Brigham, the executive vice-president of Dixilyn, adverse to Crescent, and with the Court's permission we'd like to call him under cross examination.

Harry Brigham, called as an adverse witness and having been duly sworn, testified as follows:

Cross examination.

By Mr. Kohlmeyer:

Q. What is your occupation, Mr. Brigham?

A. Executive Vice-President of Dixilyn Drilling Corporation.

Q. Where is your office?

A. 1320 Saratoga Building, New Orleans 12, Louisiana.

Q. In what state is Dixilyn Drilling Corporation incorporated?

A. Delaware.

Q. Are you the manager of the New Orleans office?

A. That is correct.

Q. During the course of the completion of your rig Julie Ann just prior to her movement downriver, did you have occasion to negotiate for the movement of the rig from LeTourneau's plant to New Orleans?

A. Yes. The reason I'm hesitant in saying yes is that there were some casual discussions, and the main negotiation was held between Mr. R. V. Tidwell and the Crescent [fol. 117] representative.

Q. Where?

A. In our New Orleans office.

Q. Were you present?

A. No, sir, I was not.

Q. Were you present at any of the meetings with Crescent's representatives?

A. There again I have a faint recollection, as I said, of casual discussions concerning or relative to Crescent's ability to furnish the necessary equipment to make the tow downriver, and at that time, due to my absence or the pending absence of being out of New Orleans, suggested and requested my assistant, Mr. Tidwell, continue negotiations with Crescent Towing.

Q. Am I right then in stating that you were present at the first meeting but not present at the second meeting? Is that correct?

A. There again, to the best of my knowledge, I think that would be so. Let me state again that we talked casually in the Petroleum Club in the hall or lobby, and also we had what I would term a rather loose session in my office. Really, in my opinion, it was a "get acquainted" session, when they were soliciting our business.

Q. Were you present at a meeting where Crescent was represented by Mr. Mike Smith and Mr. Dick Apgar?

[fol. 118] A. Not the meeting that culminated in the final agreement that they make the tow, no, sir.

Q. Was Mr. Boring present at that time?

A. No, sir.

Q. Were you at any meetings in which Mr. Boring participated?

A. Now, not a meeting per se relative to the towing. I recall Mr. Boring in a visit to New Orleans, being in the office at the time, I believe, Mr. Apgar and Mr. Smith were in the office, and to the best of my recollection it was merely a "shake hands and how do you do," that Mr. Boring didn't enter into any of the specific details concerning the tow.

Q. Did you receive any communications from Crescent relative to this movement? When I say "you," I mean Dixilyn in New Orleans.

A. Yes, we received several letters.

Q. Do you have those letters with you?

A. Mr. Vickery—?

Mr. Vickery: I have those letters, and I'm sorry, but I left them in the hotel room.

Mr. Watkins: It is my recollection those are attached to the pleadings and the identity are admitted by us. I think they are a part of the record already.

Mr. Kohlmeyer: I didn't know it, but we wanted to be [fol. 119] sure these letters were the ones Mr. Brigham received.

The Court: There are some copies of letters attached to the pleadings.

Mr. Kohlmeyer: Yes, sir, there are.

Q. The letters to which I referred were two letters, one of which had an enclosure dated respectively December 19, 1957, and December 23, 1958. They are attached as Exhibit A with an attachment and Exhibit B to the 56th Rule Petition which Crescent has filed against Dixilyn and already are included in the record. They are copies of copies, because the originals were mailed to Dixilyn.

The Court: Then, Mr. Watkins, you and Mr. Vickery agree those are correct copies?

Mr. Watkins: We have so admitted in the answer. We have admitted they were received.

Mr. Kohlmeyer: We now offer the letter of December 19th, with attachment, marking same as Crescent Exhibits 4 and 4A; and the letter of December 23rd, marking same as Crescent's 5.

(Same received in evidence as Defendant's Exhibits No. 4, 4A, and 5 for Crescent. Same are not copied here, as they have already been made a part of this record, appearing on pages 36 through 39.)

[fol. 120] Mr. Kohlmeyer continues:

Q. Do you know, Mr. Brigham, whether or not Mr. Tidwell signed for Dixilyn, approved, on the letter of December 23, 1957?

A. Yes, sir.

Q. He did?

A. Yes, sir.

Q. Did you see that letter?

A. Yes, sir, after the signature was put on it.

Q. Did you instruct him to sign it?

A. I instructed him he had the authority to sign it providing it was satisfactory.

Q. Satisfactory to whom?

A. To him in his discussions with others. When I say "others," I am talking about our parties that were sitting in with the original negotiations with Crescent Towing.

Q. Who are the parties?

A. I think you have a letter on file. Mr. Giffin, Mr. Stentz, Mr. Apgar and Mr. Smith and Mr. Charlie Wood.

Q. Mr. Blakely?

A. And Mr. Blakely.

Q. Those were the parties that were at the meeting at your office that you referred to that you attended?

A. That I did not.

Q. You did not?

[fol. 121] A. No, sir.

Q. Excuse me. That meeting, however, you referred to was held at your office during mid-December, 1957, prior to the towage taking place?

A. That is correct.

Q. There is no question about Mr. Tidwell's authority to approve this letter on behalf of Dixilyn, is there?

A. None whatever.

Q. Who was Mr. Stentz?

A. Mr. Stentz, to the best of my knowledge, is the representative of the Southern Marine and Aviation Underwriters.

Q. Those are the underwriters on the big policy on the rig?

A. On the second policy.

Q. On the rig?

A. Correct.

Q. Mr. Giffin, who is he?

A. He represents the same company, I don't know in what capacity.

Q. Mr. Wood?

A. Mr. Wood owned and managed, operated, the Charles D. Wood Marine Surveyors.

Q. Mr. Blakely was—?

A. An employee of Mr. Wood's.

Q. Did Dixilyn employ Mr. Wood and Mr. Blakely?

A. No, sir.

[fol. 122] Q. For whom were they acting?

A. They were acting for— This is a presumption on my part.

Q. If you don't know, of course, you may say so.

A. Well, here again, as I say, it is a presumption, but I stand to be corrected, but Southern Marine and Aviation Underwriters.

Q. Do you know who first contacted them on behalf of Dixilyn?

A. No, sir, I do not know that.

Q. You do not?

A. No, sir.

Q. Did you have any conversations with them relative to the insurance on this rig for its downbound movement?

A. I did not personally.

Q. Did any conversations take place in your presence?

A. No, sir.

Q. Were you officially advised in your capacity as executive vice-president of the company as to any conversations?

A. Yes.

Mr. Vickery: This seems all immaterial and irrelevant. I don't know what he is driving at, but I don't see the relevancy at all with relation to interrogation about insurance.

The Court: I assume it will be connected. If not, it's nil. I will let him answer.

[fol. 123] A. Conversations relative to what?

Q. The insurance, the bringing of the rig downriver from Vicksburg to New Orleans.

A. Yes, I was advised by Mr. Tidwell concerning the requirements of our coverage prior to executing the tow.

Q. Will you clarify that?

Mr. Vickery: At this time I want to object to any parol evidence at all insofar as the relation to any provisions relating to this towage which are reflected by the written agreements or the so-called contracts as reflected by these letters. This is an area of the law where the law strictly construes contracts and requires that they state in plain

and unequivocal terms and they must speak for themselves. I therefore think it improper for the Court to accept any parol evidence at all with respect to any of the negotiations leading up to the formalizations of the agreements as reflected by the letters in writing or in any way to reflect to any extent the intentions of either of the parties because these contracts are strictly construed by the courts, strictly construed by the persons who drew them, Mr. Kohlmeyer's clients, and I think it clear error to permit any interrogating with respect to the meaning, background or any of the nego- [fol. 124] tiations leading up to the culmination of it.

Mr. Kohlmeyer: If we drew them. But suppose we didn't draw them. Suppose drawn by Dixilyn, would they not be strictly construed against them? And I don't know what you are going to hold with reference to whether or not the contracts are ambiguous. If they are ambiguous, parol evidence would be seeking intent of the parties.

The Court: Yes, I will overrule the objection at this time. Of course, I think counsel has stated correctly the rule that a written contract cannot be varied by parol testimony, nor the discussions leading up to it, if it embodies all the terms; but these two letters that have been introduced in evidence along with the exhibits seem to me to be a rather incomplete contract, and it appears to me you have partially an oral contract and partially a written contract; so I will overrule the objection at this time and let the evidence go in. You can renew your objection at the conclusion of all the testimony, and if it should be that it is incompetent, then of course I will exclude it from consideration.

Mr. Watkins: If I may add one further objection. He is at this point asking Mr. Brigham to repeat something that Mr. Tidwell told Mr. Brigham. I submit that is hearsay [fol. 125] evidence of the worst kind. It is apparently an attempt to show negotiations by what an employee of Dixilyn told Mr. Brigham about what had gone on between that employee and Crescent. I submit that is not the proper way to make proof.

Mr. Kohlmeyer: We aren't, of course, trying to do that. What we are trying to do is find out Dixilyn's official position here from her chief executive officer there on the scene. Mr. Brigham was the chief executive.

The Court: I will make the same ruling on that which I did on the other. Here are two officers of the concern having a discussion with reference to a contract, and if it should become material, in order to interpret the contract, to hear oral testimony, it would be competent, I think, for one side to show how the other side interpreted the contract. So I am going to overrule the objection now and let him answer it, with your right to renew; and if it is incompetent, I will exclude it from consideration in reaching a conclusion in the case.

Mr. Kohlmeyer continues:

Q. Mr. Brigham, could you recall for us the result of the conversations between you and Mr. Tidwell, bearing this in mind; that we want only the position of Dixilyn as a [fol. 126] corporation, of which you were the executive vice-president.

A. Relative to the insurance?

Q. Relative to the insurance and to the contract.

A. The discussion I had with Mr. Tidwell relative to the insurance was that it was deemed advisable before the tow was made to secure additional coverage. I believe that the manner in which it was expressed was that it was necessary to have coverage equivalent to the value of the vessel and not of the corporation. Our insurance is handled by Mr. M. O. Boring, Sr., Vice-President of Dixilyn Drilling Corporation, who was contacted and secured the additional insurance. I do not recall in what amounts additional insurance was acquired.

Q. Did Mr. Tidwell report to you that the insurance requirements of the contract had been completed?

Mr. Vickery: I think he is asking this man to interpret the contracts again, and he is asking for a conclusion of law. He is asking him whether or not he knows whether the insurance provisions of the contract were complied with. I don't think there are any insurance provisions in the contract. I think he is asking this witness to invade the Court's province to interpret the meanings of the contract [fol. 127] between the parties.

The Court: As I understand it, the question was whether or not Mr. Tidwell told him that the contract had been completed, so I will overrule the objection, if I understood the question correctly.

Mr. Kohlmeyer: That is correct, exactly.

A. Mr. Tidwell did advise me that, contacting Mr. Boring —that he was then apprised of the fact that our insurance agents, I presume you would call them, the Brantz Company, had us covered in the amount and for the purposes that Mr. Boring had requested.

Q. Will you state, please, if you know what purposes Mr. Boring had requested that insurance for?

A. He had requested the insurance in the amount equivalent to the value of the vessel.

Q. Did he not, Mr. Brigham, also request that the insurance be such as would protect Crescent from any claim which would be urged by virtue of damage to third parties during the course of the towage?

A. No, sir. Our concern was protection of Dixilyn Drilling Corporation. That was the reason, as I said, it was not the value of the company, but up to the value of the vessel.

Q. When—

A. —I was going to say, your letter there states that [fol. 128] Crescent Towing has ample horsepower and ample insurance.

Q. When was the first time you saw the letter from Crescent to Dixilyn dated December 23, 1957? I'll show you a copy so you can refresh your memory from that.

A. Well, gentlemen, I recognize the letter. As to when was the first time I saw it, I can't recall that—this is not the first letter we received, dated December 31, 1957.

Q. I know you don't know the minute, of course, but was it before Mr. Tidwell signed it or after?

A. I saw this letter after it was signed.

Q. Did you see it the same day it was signed? Do you recall?

A. I do not recall. I'm rather certain I didn't. Had I seen it that day, I would have signed it.

Q. Do you know whether or not you saw this letter before the Julie Ann left LeTourneau's plant?

A. I don't know definitely, but I'm quite positive I did.

Mr. Watkins: We have a standing objection to this line of questions?

The Court: Yes, I will give you a standing objection, and it will be overruled under the same ruling I gave you. You don't waive your objection by failing to renew them to questions along this line.

[fol. 129] Q. Do you recall having seen Crescent's letter to you of December 19th after its receipt by you?

A. May I look at the letter?

(Hands to witness.)

A. Your question was do I recall having seen it prior to when?

Q. When did you first see it, would you know?

A. Gentlemen, I wouldn't know. This has been 27 months.

Q. Do you have a time stamp system in your business?

A. No, sir, we do not.

Q. Do you initial letters, date them when you read them?

A. Not date them. Merely to advise the secretary it has passed my desk and is ready for filing.

Mr. Kohlmeyer: I think it might become necessary for us to ask that Mr. Vickery produce tomorrow the originals of those letters so we can substitute them for the copies.

Mr. Watkins: We have no objection.

The Court: All right.

Q. Do you recall whether or not any action was taken by you subsequent to the receipt of this letter, Mr. Brigham?

A. Any action taken by me subsequent to the receipt of this letter?

[fol. 130] Q. Yes, with reference to the insurance or towage or to the contract. —Well, I'll ask you the direct question. Isn't it a fact that after you received that letter you referred that letter to your underwriters?

A. No, sir.

Q. That is not a fact?

A. No, sir, not this letter.

Q. Did you have any conversation with your underwriters subsequent to the receipt of that letter and before receipt of the second letter?

A. No, sir.

Q. Do you know if anyone in your organization did?

A. Not to my knowledge. Let me say again that there is another letter dated December 23rd which was written as a form of contract, but was not signed by anyone in Dixilyn Drilling Corporation.

Q. Then you got two letters dated December 23rd from Crescent? Is that correct?

A. That is correct.

Q. And the first letter you got from Crescent dated December 23rd, did you see it at the time of its receipt?

A. No, sir.

Q. When did you first know that it had been received?

A. There again, because of my travels and the manner in which I was operating, I couldn't tell you whether it was [fol. 131] two days later or an hour later.

Q. Did you then talk to your underwriters about this matter?

A. I did not, personally.

Q. Did Mr. Tidwell report to you that he had talked to them?

A. Yes, he did.

Q. Do you know what action was taken subsequent to his discussion with the underwriters?

A. Well, here again I'm referring to the best of my knowledge, to the report that he made to me, that there was a portion of one paragraph that was objectionable.

Q. To whom?

A. To our underwriters, and would not be satisfactory to enter into, and requested that it be deleted.

Q. Do you know to whom he made that request or if he made that request?

A. On whom he made what request?

Q. To delete that portion of the letter.

A. Mr. Tidwell did not make the request that it be deleted. He was advised by Mr. Gifford or Mr. Stentz—there again I don't know which it is—this is strictly from the best of my recollection—that it should be deleted.

Q. Isn't it a fact you then put Crescent in direct touch with your underwriters and Mr. Stentz discussed the matter with Crescent's officials?

A. Not to my knowledge. The report that was made to [fol. 132] me, that upon having received the advice, Mr. Tidwell talked to Mr. Apgar and told him it would be necessary to delete that portion of the paragraph.

Mr. Kohlmeyer: Do you have that letter?

Mr. Vickery: The two letters of December 23rd? Yes, we have both of them.

Mr. Kohlmeyer: I'll not then introduce our file copy. I'll wait until the other letter is produced and ask that it be marked as Crescent 6 when produced.

Q. Is it your testimony that this clause was stricken at Dixilyn's request or Dixilyn's instruction?

A. That's correct.

Q. Will you state if you know whether those instructions came from the underwriters?

A. There again I presume they were from the representatives of the underwriters.

Q. To whom were they given? Mr. Tidwell?

A. Mr. Tidwell.

Q. Mr. Tidwell carries on all negotiations with underwriters?

A. That's correct. All negotiations carried on from the New Orleans office.

Q. That's what I mean. Where is Mr. Tidwell now?

A. Mr. Tidwell is here in Vicksburg.

[fol. 133] Q. He is still employed by Dixilyn?

A. Yes, sir.

Q. Do you know what sort of insurance Dixilyn carried on the Julie Ann as to the third party liability?

A. No, sir. I have to admit ignorance so far as insurance policies are concerned.

Q. If I were to show you copies of policies that purport to cover liability of Dixilyn to third parties the damage caused by the rig in the period in question, would you be able to identify them as being correct copies of the documents?

A. I certainly would not.

Mr. Watkins: We object to that description of the policies. He is attempting to interpret the policies. If it be a policy of Dixilyn, I think it will speak for itself.

Mr. Kohlmeyer: There was no intention for me to testify.

A. I would not, no, sir.

Mr. Kohlmeyer: Would you stipulate these two policies are the policies?

Mr. Vickery: These are the copies. If they conform with our file copies, there will be no problem to stipulate [fol. 134] them. To save time, I suggest he proceed and interrogate the witness with respect to them and in line with the Court's ruling this afternoon, he can handle this tonight without taking the Court's time to check the policies at this time.

Mr. Kohlmeyer: I offer now as Crescent's Exhibit 7 Employers Casualty Company Comprehensive General Liability Policy, with all endorsements; and as Crescent's 8 a Certificate of Insurance, Number LADA 59289, issued by Swett and Crawford to Dixilyn Drilling, as Assured, with the request that we do not physically present them now, but afford Mr. Vickery an opportunity to check the policies.

The Court: To keep the record straight, let them be marked, and if there is any inaccuracy, then we can strike them.

(Same received in evidence and marked as Defendant's Exhibits Nos. 7 and 8, respectively, for Crescent Towing & Salvage Company. Same are not copied here but, upon order of the Court, are being sent up in original form.)

Mr. Kohlmeyer continues:

Q. I understand you do not know anything about these insurance policies as such?

A. I wouldn't say anything about them, if you're speak [fol. 135] ing of in detail. Yes, that's true. I know very little about them. Generally, I know that we have coverage. Now, as to being able to interpret the policies step by step, I'm afraid I would be rather inadequate.

Q. Do you recall, Mr. Brigham, whether or not there was any discussion in your office at any get-together at which you were present, relative to taking some footage off the legs of the rig while it was coming downriver?

A. No, sir, I wouldn't know of any reason for that discussion.

Q. Was there any portion of the leg taken off?

A. No, sir.

Q. Are you certain of that?

A. I'm certain of that. There was a portion of the leg left off intentionally under the terms of the contract.

Q. I beg pardon? Which contract was that?

A. With LeTourneau.

Q. How much was left off?

A. Thirty feet.

Q. Of each leg?

A. That's right.

Q. Was that a change in the contract with LeTourneau?

A. No, sir. No, that was written in the original specifications. Not only were the legs not entirely extended, but the derrick was not erected.

[fol. 136] Q. That was a long time before this towage contract was made? Before the towage was arranged?

A. Oh, yes. You are talking about, now, the contract between Dixilyn and—

Q. And LeTourneau.

A. Yes.

Q. In other words, it was always contemplated when LeTourneau was constructing the rig that thirty feet of each leg would be left off?

A. That is correct.

Q. I show you here, Mr. Brigham, three sheets of printed specifications purporting to represent the Julie Ann, and I ask if you can identify those three sheets as being the overall specifications for the rig.

A. Yes, sir.

Q. They are true copies? Is that correct?

A. Well, there again there is considerable detail on here, but I would say they are true copies, yes, sir.

Mr. Kohlmeyer: We offer as Crescent's Exhibits 9, 10 and 11 the three sheets of specifications which the witness has just referred to.

The Witness: May I interrupt or add a little to this?

Mr. Kohlmeyer: Certainly.

The Witness: Those are the specifications, designed specifications, and as the rig presently exists; not as it [fol. 137] existed coming down the river when it left Vicksburg.

Q. What differences were there?

Mr. Vickery: I don't see the materiality of all this. If the Court wants to—

Mr. Kohlmeyer: It's background. I think you want to know how big it was and how high and the measurements of the rig.

A. My other point here— It shows the leg 175 feet. When it left Vicksburg, they were not 175 feet in length.

Q. They were 145, weren't they?

A. I believe 143.

Q. Aside from that, that is the way the rig left Vicksburg to move down the river?

A. I would say from all appearances, yes, sir.

The Court: I'll overrule the objection. Let them be marked.

(Same received in evidence and marked as Defendant Exhibits Nos. 9, 10 and 11, respectively, for Crescent Towing and Salvage Company. Same are not copied here but, upon order of the Court, are being sent up in original form.)

[fol. 138] Mr. Kohlmeyer continues:

Q. Who in Dixilyn's organization, Mr. Brigham, first determined to contact Crescent relative to this towage movement?

A. There again so far as I know, we were contacted by Crescent. I'm not stating that as a fact. I say "so far as I know."

Q. Did you contact any other persons to do this towage?

A. Not to my knowledge.

Q. Do you know whether or not there are any others that could do it?

A. Definitely there are others that could do it, I presume. There are lots of them in business.

Mr. Kohlmeyer: I think that is all.

The Court: Any examination at this time?

Mr. Vickery: Not at this time.

The Court: I believe at this point we will take a recess until nine o'clock tomorrow morning.

(Whereupon the hearing was recessed until the following day.)

Tuesday, March 29, 1960, the hearing was resumed:

Mr. Kohlmeyer: Before we start this morning, we have checked the two policies offered yesterday as Crescent's Exhibits 7 and 8, and it is now stipulated and agreed that [fol. 139] the photostats, with the permission of the Court, may be substituted in lieu of the originals, and that these photostats represent true and correct copies of the original policies with the exception of two endorsements on Exhibit Number 8 and four endorsements on Exhibit 7, none of which are material to the issues before us.

The Court: Let them be substituted and marked.

(Whereupon the photostatic copies of Defendant's Exhibits Nos. 7 and 8 were duly marked and substituted for the originals previously received in evidence.)

Mr. Vickery: In order that the Court may have the benefit of all the insurance in effect, we also would like to introduce in evidence Certificate 8074, Underwriters at Lloyd's policy. If the Court is going to take any of the insurance, it ought to have it all.

Mr. Kohlmeyer: Suppose, in order to keep the record straight, I offer this as Crescent's exhibit, with the understanding that a photostat will be substituted.

Mr. Vickery: That will be fine.

(Same received in evidence and marked as Defendant's Exhibit No. 12 for Crescent Towing & Salvage Company. [fol. 140] Same is not copied here but, upon order of the Court, is being sent up in original form.)

Mr. Kohlmeyer: We also now tender to the reporter for marking as Crescent's Exhibit 6 the original letter of

December 23rd, sent by Crescent to Dixilyn, and which was given to us this morning in response to our call of yesterday by Mr. Vickery, it being understood this letter was the first of the letters of December 23rd that were sent by Crescent to Dixilyn.

(Same received in evidence as Defendant's Exhibit No. 6 for Crescent Towing & Salvage Company. Same is copied below.)

CRESCENT'S EXHIBIT NO. 6

DEC 24 1957

CRESCENT TOWING & SALVAGE CO., INC.
General Towing — Salvage Operations
625 Hibernia Bank Building
New Orleans 12, La.

December 23, 1957

OPERATING TUGS:
Humrick — Lillian
Port Allen — Port Hudson
William S. Smith
Sandra — Ocean Prince
Orleans

(Initials RT and HB)

Dixilyn Drilling Corporation
Saratoga Building
New Orleans, Louisiana.

Gentlemen:

With further reference to our undertaking to tow your drilling barge JULIE ANN from Vicksburg to our Fleet [fol. 141] Landing in New Orleans and then down the Mississippi River into the Gulf, we confirm that the following additional clause shall be included in the contract as part of the consideration for our undertaking the towage:

~~You agree to indemnify us, our tugs and equipment and all other parties taking part in the towage and their equipment and our and their underwriters of and from any and all liability or claims which may arise out of the towage of~~

~~the drilling barge~~. It is particularly understood and agreed that you are authorized to and by this agreement do release and relieve us from any liability for account of your underwriters and that any damage claims urged by third parties as well as any claim which may be urged by virtue of damage to the drilling rig in the course of the towage shall be for your account and account of your underwriters.

It is further understood that the amount of the insurance protection which you have in force equals the value of the hull of the barge as to hull insurance and amounts to four million dollars as to third party claims.

If the foregoing meets with your approval and represents this portion of our agreement, please sign and return to us the attached three copies of this letter, retaining the original and the other copy for your files.

[fol. 142] Very truly yours,

CRESCENT TOWING & SALVAGE CO., INC.

BY /s/ WARREN C. APGAR
Warren C. Apgar
VICE PRESIDENT.

WCA:m

APPROVED:

Dixilyn Drilling Corporation

BY: .....

(NOT SIGNED.
ALL COPIES—Retained.
H.S.B.)

Mr. Kohlmeyer continues:

Mr. Kohlmeyer: I think it is unnecessary to mark any of these other original letters from their files because they are already before you and it has been stipulated, and they were received in due course and were signed by both parties where it shows they were signed on the typewritten copies annexed to the 56th Rule Petition.

The Court: Yes, sir. That won't be necessary to introduce them again. The original letter you offered in evidence, as I understand, is different from the exhibit that was filed?

Mr. Kohlmeyer: That is correct. The first of the two letters of December 23rd which Crescent sent to Dixilyn and which was not the one which was signed. The lined matter was stricken from the one which was signed. Mr. [fol. 143] Vickery has asked us to stipulate, and we do stipulate, that the Crescent Towing and Salvage Company carried hull and P. I. insurance on the tug Orleans in an amount more than sufficient to cover the amount of claim of the Libelants in this case. Is that sufficient? (To counsel.)

Mr. Vickery: Yes, I think so.

Mr. Kohlmeyer: Also, it is stipulated that by hull insurance we mean insurance on the vessel itself and included therein is a collision clause and a tower's liability clause which would take care of claims made by third parties insofar as ships or vessels are concerned, or insofar as a vessel in tow is concerned. By P & I insurance we mean insurance against loss of third parties to fixed or immovable objects such as bridges, wharves, et cetera; so there would be no question, so this insurance would cover a collision with another ship or vessel or a wharf or bridge.

Mr. Vickery: That covered any liability that might arise out of any of these tugs used in this operation, even not owned directly by Crescent.

Mr. Kohlmeyer: I rather doubt that would be so on account of the coverage of the P & I and the hull.

Mr. Vickery: Do you have tower's liability?

Mr. Kohlmeyer. We had tower's liability on the Orleans; not on the non-owned vessels.

Mr. Vickery: Not on the flotilla?

Mr. Kohlmeyer: No, sir.

[fol. 144] WILLIAM S. SMITH, JR., called as a witness and having been duly sworn, testified as follows:

Direct examination.

By Mr. Quin:

Q. You are William S. Smith, Jr.?
A. Yes, sir.
Q. You live in New Orleans?
A. Yes, sir.
Q. You are the vice-president of the Crescent Towing & Salvage Company, Incorporated?
A. Yes, sir.
Q. How long have you been the vice-president of that company?
A. Sixteen years.
Q. The company was incorporated in Louisiana in 1942?
A. That is correct.
Q. And you went to work there immediately after you stopped college? Is that correct?
A. Correct.
Q. This company is owned by you and the members of your family?
A. That is correct.
Q. And it is an integrated operation with several other companies involved in the handling cargo and forwarding of cargo in New Orleans?
A. Correct.
[fol. 145] Q. All the companies have the same offices at one place?
A. Yes, sir.
Q. And the same executives? Is that correct?
A. That is correct.
Q. What tugboats did Crescent own and operate in December of 1957?
A. The William S. Smith, Humrick, Ocean Prince, Port Hudson, Port Allen, Sandra, and the Lillian.
Q. What about the Orleans?
A. Yes, the Orleans. Pardon me.
Q. What is the difference between a tug and a river towboat?

A. Generally speaking, a river towboat is a square bow, square stern, square side, flat bottom vessel designed primarily for work on the inland waters where you have rather big calm water.

Q. And a tug?

A. A tug is a model hull vessel, pointed bow, rounded stern, rounded bottom, primarily designed as a hawser tug; that is, to pull on a line, that is very flexible and can hitch up alongside of barges or ships or anything else—that it's more flexible for our operation. We use them also in the tideland where we couldn't use the inland boats outside. These tugs are flexible; just about go any place.

Q. What is Crescent's business insofar as the towing is concerned.

[fol. 146] A. Primarily harbor towing and tideland towing.

Q. Does Crescent work upriver?

A. Well, I'd say—

Q. Upriver from New Orleans, I mean.

A. On occasions. Actually we are in business to make money and if a job presents itself upriver where there is a dollar to be made, we'll go.

Q. But primarily?

A. Generally speaking, we do not engage in upriver towing as such.

Q. How many companies are there in New Orleans involved in harbor towing such as Crescent is, and outside towing like Crescent?

A. Four.

Q. Who are they?

A. George Whiteman, Willie Bisso and Edwin Bisso. Willie Bisso is New Orleans Coal and Towboat Company.

Q. Do you have any competition from Mobile?

A. Mobile Towing and Wrecking Company. That's very much competition.

Q. How about from the Houston area?

A. G & H in the west Gulf give us competition offshore and foreign deep sea work.

Q. Are there any other tugs similar to those owned and operated by Crescent that are owned and operated by third

parties other than those you have mentioned in the imme-
[fol. 147] diate area of New Orleans?

A. There's many tugs down there, but not of the caliber we are talking about that's in the immediate area. Usually speaking, they are smaller vessels.

Q. Are you familiar with upriver towing?

A. Yes, sir.

Q. Are there any upriver towboats available in and about the vicinity of New Orleans and Vicksburg that might be used in the handling of a tow from Vicksburg to New Orleans, such as the Julie Ann?

A. Oh, literally hundreds.

Q. Does Crescent publish a tariff or publish its rates for upriver towing?

A. No.

Q. You are not a certified carrier?

A. That is correct.

Q. And you have no regular run from one place to another?

A. No, sir.

Q. And you don't hold yourselves out to serve anyone who comes along?

Mr. Watkins: Object as leading.

The Court: Yes, it is leading, but I'll overrule the objection and let him answer.

A. What was the question?

[fol. 148] Q. You don't serve anyone who walks in your door and asks you to serve them?

A. No.

Q. Each individual movement is by special contract?

A. That is correct.

Q. Now, Mr. Smith, insofar as the Julie Ann movement from Vicksburg to New Orleans is concerned, will you state, please, the first time that you had any contact with that movement?

A. The first time I had contact with the movement was at a meeting held in the office of Dixilyn in the Saratoga Building.

Q. Who called the meeting?

A. Well, we had made contact on the phone and they

told us that as soon as Mr. Boring was in town they'd like to sit down and talk about this movement.

Mr. Watkins: For the sake of the record, do we understand we are objecting to these alleged negotiations which we think are an attempt to possibly alter the written alleged contract that they have sued on? As I understand the Court's ruling yesterday, you want to hear it, but we are permitted a continuing objection?

The Court: Yes. I overrule your objection and permit you to have a standing objection to it. The objection will [fol. 149] be overruled without your having waived it.

Q. State who was at the meeting.

A. Mr. Boring, Mr. Brigham, Mr. Tidwell, Mr. Woods, Mr. Blakely, Mr. Apgar and myself.

Q. Do you recall the date of that meeting?

A. Early December.

Q. That was before the movement, of course?

A. Definitely.

Q. Will you state who Mr. Blakely and Mr. Woods were?

A. They were surveyors. I've known Charlie Woods for years, and Blakely as well, and they were surveyors for the underwriters, to the best of my knowledge.

Q. Did you know of your own knowledge that they did or did not work for Dixilyn, as such, principally?

A. Generally they did not work for Dixilyn. They were not introduced as Dixilyn.

Q. You knew they were independents who worked in insurance?

A. Right.

Q. Did you have any contact with them about the work prior to the time you saw them in the office about Dixilyn's Julie Ann?

A. No.

Q. Did you know they were going to be at the meeting, when you got there, before you got there?

[fol. 150] A. No.

Q. Were they introduced to you as being there in any special capacity?

A. They were introduced as being with Southern Marine and Aviation.

Q. Do you know who Southern Marine and Aviation were?

A. Yes, sir, we have run into them quite a bit in these building rigs.

Q. Who are they?

A. They are underwriters, handle a big portion of the building industry.

Q. And Mr. Woods and Mr. Blakely were held out by Dixilyn as being representatives of Southern Marine and Aviation?

A. Correct.

Q. What was discussed at that meeting, Mr. Smith?

A. We discussed the movement of the Julie Ann from Vicksburg to New Orleans; went into the actual physical movement. We discussed that and we talked about horsepower and the number of boats that would be involved.

Q. Had Crescent moved any other rigs from LeTourneau to New Orleans prior to this time?

A. Yes, sir, we had moved the Deep Water Number Two and the Barnwell rig—

Q. How many rigs had come out of LeTourneau at this time?

A. I think four. This was the fifth, this Julie Ann.

Q. Was there any discussion about the size of the legs of the rig?

[fol. 151] A. Yes, sir, we talked about the legs or the height of the legs coming under the bridges. We figured it would be better to leave a portion of the legs off, and we recommended sixty feet because of the height of the river at the time, and we thought it would be better for the overall handling of the job to leave sixty feet off and assemble that back when we got here back down to New Orleans.

Q. Who took us that suggestion? I think you said "we recommended." Who recommended?

A. I did.

Q. What was the result of that recommendation?

A. I think Mr. Brigham— In fact, Mr. Brigham told me they had already made arrangements to leave thirty feet of the legs off, and Mr. Woods was confident that that would be enough to effect the movement.

Q. Was any discussion had about the personnel who was to be on the Crescent vessel involved, or vessels, involved in this movement?

A. We were asked if Captain Brechtel would be available to go on this movement, and we assured them we would make him available to come down with the tow.

Q. What was Brechtel's special involvement in this?

A. He was to coordinate the movement of the three vessels in bringing the rig down.

Q. What was his experience involved in towing rigs downriver?

[fol. 152] A. Well, this was to be the third one he had towed down, and he holds a license all the way up to Cairo, St. Louis. He has been on river towing.

Q. He had handled the prior tows Crescent had brought down?

A. That is correct.

Q. Was there any discussion about any other towboats or tug boats to be used?

A. We discussed horsepower, and because we didn't know at that time what boats actually would be in the vicinity and available to make this tow—we just—generally speaking, horsepower, and it was suggested by Mr. Woods the Ouachita would be in Vicksburg, and we said we would have no objection to using it.

Mr. Vickery: I want to object to any conversations or statement made by Mr. Woods in connection with this matter as being hearsay as to Dixilyn Corporation. The man, unfortunately, is dead and unavailable for testimony in the court, and any transactions with him—especially since he was not a representative of Dixilyn but was there as a representative of an independent company not a party of this suit, I think any actions taken by Mr. Woods are not binding on Dixilyn.

The Court: Let me ask: Was Mr. Brigham or any other representative of Dixilyn present when this—

[fol. 153] The Witness: Yes, sir.

The Court: For the time being, I will overrule the objection, giving you the right to renew it. Was he in hearing distance of this alleged conversation?

The Witness: Yes, sir, we were all in Mr. Brigham's office.

The Court: For the time being, I will overrule the objection.

Mr. Quin continues:

Q. Will you proceed? You were telling us about the discussions relative to horsepower.

A. Well, we were talking about the total amount of horsepower we would recommend to effect this movement, and the Ouachita was suggested by Mr. Woods as being in Vicksburg, and we had no objection to using it because she fell into the horsepower range we were talking about. And then we told them we'd get another boat, the Toltec, in that horsepower class, and it so happened we were able to turn the Toltec around and effect the tow to New Orleans.

Q. What was the rated horsepower of the Orleans?

A. 700 horsepower.

Q. And the Ouachita?

A. 1800.

Q. The Toltec?

[fol. 154] A. 3600 or 4000, in that range. She's twin screw.

Q. Were those horsepowers known to the parties in the room when they were being discussed? Were they mentioned, or were the vessels involved known to the parties?

A. The Ouachita was known. The Orleans was known. The other reference was made to horsepower and the Toltec was mentioned as being in the category of horsepower, that class we had booked for.

Q. Is it fair to state you are talking about the total horsepower and not individual vessels?

A. Correct.

Q. And the total horsepower of those three vessels—Strike that. Is it a fair statement then that the negotiations at this point referred to a total horsepower of approximately 6500 or 7000, in that range?

A. That is correct.

Q. And what vessels you used in developing that horsepower was of no—?

A. —That is correct. Just a question of what boat you could turn around in the area around Vicksburg to effect the movement.

Q. Were rates discussed at that time?

A. Very generally and very vaguely. We knew what the Orleans was. We were prepared to furnish the rate on the Orleans on the spot. And the Ouachita had just come up at this meeting, and we hadn't been able to negotiate a rate with them but we gave an indication as to that [fol. 155] much power would cost so much money, the same as the bigger boat. Just indications only.

Q. No rates actually quoted as firm rates for this movement?

A. No, sir.

Q. Were any other matters discussed?

A. Well, we went into a bunch of subjects involving—such as where to tie up when we got down here, making arrangements to berth her and have a party on.

Q. State about the party.

A. Well, the party, the christening party, was held right at Bienville Street wharf.

Q. I'm talking about telling the Court what your conversations were that day relative to the party to be held in New Orleans.

A. Oh. Well, there again very general. In other words, what had to be done was the rig had to be brought down and they were looking for a safe pier to tie it up to complete the rig when they got it down. After the rig was completed, on a given date we would then move it over to a wharf in New Orleans to be furnished at the time, and there was going to be a christening party aboard the rig with the industry generally invited to inspect this new driller.

Q. Who was going to give that party?

A. Dixilyn Drilling. And LeTourneau participated too.

Q. What was your part in the party? What was the conversation with you about it insofar as the party was [fol. 156] concerned?

A. We were going to make arrangements with the Dock Board to have a wharf available for us so they could conduct this party. —Try to get a guarantee out of the Dock

Board so they could have the invitations printed up in time enough to know exactly where to put the rig.

Q. Was there any discussion in that meeting with reference to a release clause or insurance insofar as it would inure to Crescent?

A. We started to get into that, and Mr. Boring told us he would rather not discuss that at that particular meeting. All he wanted to discuss at this meeting was the physical movement of the rig from Vicksburg to New Orleans.

Q. And the conditions of the towage relative to releases were not gone into, as such, at that meeting?

A. That is correct.

Q. And the reason they weren't is because Mr. Boring said he didn't want to discuss that?

A. That is correct.

Q. Did he state why he did not want to discuss it?

A. He said we would have another meeting at another date to get into that phase of it.

Q. Was the insurance on the Dixilyn rig mentioned during that first meeting?

[fol. 157] A. Mentioned? Yes.

Q. In what regard?

A. I think Apgar mentioned something about our standard form of agreement up here that would have to be held, and released from all liability on this thing, and that is when we were told we would have to get into that at a later date.

Q. On your prior movements of—

A. —No, on Deep Water Two.

Q. —Had you had release clauses?

Mr. Vickery: We object to that. What two other parties had to do with moving another rig has no bearing.

The Court: I can't see the relevance. Of course, you are entitled to an answer for the record, but I think I'll sustain the objection.

Q. Don't answer. Now, who was the technical man in that meeting for Dixilyn? I'm trying to find out whether the personnel of Dixilyn at the meeting were technical men or office personnel, if you know.

A. Well, actually that was our first meeting with them, and I wouldn't have any way of knowing, going into that meeting, just who was who, actually. They all discussed this thing as if they had been well acquainted with the [fol. 158] problems in moving these rigs or other rigs.

Q. Who owns the Ouachita? Do you know?

A. No, sir, I don't.

Q. Do you or any member of your family or company have any interest at all in the ownership or operation of the Ouachita?

A. No, sir.

Q. Did you at any time?

A. No, sir.

Q. Who owns the Toltec?

A. I don't know that either. I think she is operated by Jack Neilson, but I don't know who owns her.

Q. Have you or any member of your family or company now or at any time any connection with the ownership or operation of the Toltec?

A. No.

Q. It is completely immaterial to you as to what towboats were to be used in this movement?

A. That is correct.

Q. Was there any discussion in this meeting as to the riding crew, if any, to be put on board the Julie Ann?

A. No, sir, we didn't get into that phase. They were going to have their own people on board. We never put riding people on drilling rigs.

Q. In other words, Dixilyn was to have a riding crew [fol. 159] aboard in its own discretion and not as a part of Crescent's duties? Is that correct?

A. That is correct.

Q. Do your personnel know anything about the operation of a drilling rig insofar as its legs going up and down and its machinery are concerned?

A. No, sir.

Q. Would they be capable of operating the machinery of a drilling rig?

A. No, sir, we have no knowledge of that.

Q. Was there any understanding reached at this meeting as to who would operate the legs on the rig?

A. No, sir.

Q. It was known, of course, that those legs would have to be lowered and raised during the course of the voyage?

A. Definitely.

Q. When you say there was no understanding reached, will you explain that answer, please?

A. We assumed somebody was going to do it, but was understood we wouldn't. I mean, it was never asked of us to perform such a service. All we were going to do was tow it.

Q. Did Mr. Boring or Mr. Brigham or Mr. Tidwell have any discussions at that meeting relative to the amount of horsepower that was necessary to be generated on this movement, if you recall?

[fol. 160] A. Well, they asked us what we thought it would take, and we made the recommendations and they went along with them.

Q. Who is "they"? When you say "they asked us"—Do you recall whether that was Mr. Woods or Mr.—?

A. I think it was Woods. In fact, it was clearly Woods that asked how much horsepower we thought it would take to effect this movement, and we told him with the river at the stage it was and one thing and another, we thought it would take every bit of 6000 or more to effect this movement.

Q. I'm trying to find out if any of the three Dixilyn officers in that meeting had any part in that discussion.

A. They were all present.

Q. I understand, but did they discuss themselves or just listen?

A. I think— No, Charlie Woods asked the question and it was confined— The discussion was more or less confined with Woods and myself as to the horsepower that was to be used.

Q. But within the presence of Dixilyn and in the hearing of the Dixilyn people?

A. Definitely.

Q. And you are certain that there was an agreement that this horsepower was sufficient?

A. Yes, sir.

[fol. 161] Q. And whether Woods said it or Blakely or someone else in the room, it was agreed that the horsepower was sufficient horsepower?

A. Correct.

Mr. Quin: You may question.

The Court: You may cross examine without waiving any of your objections heretofore made.

Cross examination.

By Mr. Vickery:

Q. Mr. Smith, I want to be sure I understand just what your approach to this particular towage problem was. You openly solicited this job, did you not?

A. Yes, sir, we did.

Q. You openly solicited it more than a month in advance of the anticipated movement, did you not?

A. Well, we have form letters we send out periodically to all the people in the oil industry.

Q. I ask if you recognize the signature of your operating manager, Mr. Pic, on this letter.

A. Yes, sir.

Q. In which he openly solicits this movement and in which he represents to Dixilyn Drilling Corporation that you all are experts in the field.

A. Correct.

[fol. 162] Q. And that you are extremely competent to handle this job.

A. Right.

Mr. Vickery: We offer this.

(Same received in evidence and marked as Defendant's Exhibit No. 3 for Dixilyn Drilling Corporation. Same is copied below:)

DIXILYN'S EXHIBIT No. 3

CRESCENT TOWING & SALVAGE CO., INC.
General Towing—Salvage Operations
625 Hibernia Bank Building
New Orleans 12, La.

OPERATING TUGS:
Humrick—Lillian
Port Allen—Port Hudson
William S. Smith
Sandra—Ocean Prince
Orleans

November 18, 1957

Mr. Pickering
Dixilyn Drilling Corp.
P. O. Box 621
Morgan City, Louisiana.

Dear Sir:

We understand you will have in the very near future a drilling rig to be moved from Vicksburg, Mississippi, to a location in the Gulf of Mexico.

We would appreciate your affording us the opportunity to submit a bid on this movement and are listing hereunder our tugs which are available for towage service.

[fol. 163]

GRT	Tugs	Built	H.P.	Length	Beam	Depth
574	"William S. Smith"	1943	1850	144.0′	32.8′	15.8′
418	"Humrick"	1919	1700	142.0′	27.5′	14.6′
395	"Ocean Prince"	1944	1400	116.0′	30.0′	14.8′
194	"Sandra"	1942	1200	93.1′	25.0′	11.6′
199	"Port Allen"	1943	1000	93.1′	25.0′	11.6′
199	"Port Hudson"	1943	1000	93.1′	25.0′	11.6′
146	"Orleans"	1943	700	81.1′	24.0′	9.0′
138	"Lillian"	1940	600	75.9′	23.5′	10.8′

All of the above tugs are carried in class in the American Bureau Register and are fully insured both as to Hull and

P & I, which we believe is a full guarantee of maintenance and efficiency.

Please let us know what horsepower will be required to move your rig and to what location, or any other arrangements which you may desire.

We have in the last two years been operating in the offshore waters in the Gulf of Mexico and have towed and handled every large rig in operation.

With anticipation of a favorable reply, we are

Yours very truly,

CRESCENT TOWING & SALVAGE CO., INC.

By /s/ E. J. PIC, JR.
E. J. Pic, Jr.
Operating Manager

EJP,Jr:m

[fol. 164] Mr. Kohlmeyer: I wanted to say that although we agree that takes us as experts, we don't agree to the characterizations Mr. Vickery puts in the record as a part of the record. Simply, the letter stands for itself, rather than what he says it stands for.

Mr. Vickery: Well, Mr. Smith agreed with me, whether Mr. Kohlmeyer did or not.

Mr. Vickery continues:

Q. You were holding yourselves out to Dixilyn to be expert in the towage, not only in barges and harbor towing, but as an expert in performing this particular towing?

A. Correct.

Q. From your particular experience?

A. Correct.

Q. And you went to them not asking them for the advice as to the amount of horsepower that ought to be used in this tow?

A. We went to them and made suggestions as to the horsepower that should be used, that is correct.

Q. And actually Dixilyn asked you for the amount of

horsepower that you thought ought to be used in connection with this towage?

A. Correct.

Q. They asked you in your capacity as an expert tower, [fol. 165] did they not?

A. Correct.

Q. And you expected them to rely on the recommendations you made with respect to the horsepower?

A. That is correct. We were all in agreement when we left there.

Q. You would have felt a little bit funny, wouldn't you, as an expert tower, if an oil well drilling company had overruled your suggestion with respect to horsepower?

A. Not necessarily.

Q. Did Mr. Tidwell or Mr. Boring or Mr. Bingham ever represent to you that they had any expert knowledge about towing or the horsepower required in connection with this movement?

A. No, sir, can't say they did.

Q. As a matter of fact, if you were perfectly frank about it, you would have to acknowledge that Dixilyn—Mr. Boring and Tidwell and Brigham—were relying entirely on you with respect to the horsepower necessary in order to make the tow?

A. That is correct. We discussed it and came up with that agreement.

Q. Now then, it was contemplated and actually developed, did it not, that you were to arrange for the necessary boats to handle this movement?

A. That is correct.

[fol. 166] Q. Dixilyn didn't have a thing to do with the arranging for the Ouachita or Toltec?

A. No, sir, left that in my hands.

Q. Left that entirely in your hands?

A. Correct.

Q. And left that to you in your capacity as an expert tower to furnish that tow?

A. Yes, and to furnish Captain Brechtel, who they requested.

Q. And you say "they requested." Mr. Woods suggested Captain Brechtel because of his previous experience?

A. Correct.

Q. Did you consider Captain Brechtel to be the most skilled man in your organization to handle this tow?

A. Yes, sir.

Q. Actually, even if Mr. Woods hadn't suggested him, he probably would have been the man you put on the job?

A. Correct.

Q. Now then, you don't have any ownership or operation of the Toltec or the Ouachita?

A. None whatsoever.

Q. —in her general operations.

A. That is correct.

Q. There is no doubt in your mind but what they were under the complete supervision and control of Captain Brechtel in connection with the towage movement?

A. No. They did cooperate a hundred percent.

[fol. 167] Q. And Captain Brechtel had the same authority and control over those two vessels as if they had been two other vessels in your fleet? Isn't that true?

A. He was put on there to coordinate the movement between the three vessels, and therefore they would come under his jurisdiction.

Q. To the same extent as if you had two other boats of Crescent Towing and Salvage?

A. Well, to this extent: that they would go along with him unless they put him in jeopardy, and then of course his authority would never have superseded the master of that particular boat.

Q. Nor the master of another Crescent boat?

A. That's correct.

Q. So he had exactly the same authority over those two vessels that he had over two of Crescent's vessels?

A. Correct.

Q. And it was your operation?

A. Yes, sir.

Q. Dixilyn didn't have anything to do with that?

A. No, sir. They knew we didn't have towboats and would have to secure them from the outside.

Q. They relied on you to see that the towboats you got was that necessary to handle this tow?

A. Fell within horsepower we recommended, that is correct.

Q. Now then, with respect to the legs, Mr. Smith, as I [fol. 168] understand it, it was your recommendation that there were sixty feet of the legs to be taken off? Is that correct?

A. That is correct.

Q. And they indicated to you that they already had thirty feet off?

A. That is correct.

Q. And they didn't think any more was necessary?

A. That is correct. Mr. Woods made a study of everything and he felt that thirty was all that was necessary to be taken off.

Q. Now then, I assume that you agreed that you could perform this towage in reasonable safety with only thirty feet off or you never would have taken on the job.

A. We admitted it could be done, but it would be a little more difficult.

Q. You felt it could be done in reasonable safety?

A. Definitely.

Q. Or you never would have taken on the job?

A. That is correct, absolutely correct.

Q. Of course, it would have been a lot easier to do it if you didn't have any legs on the barge at all.

A. Right.

Q. You felt with 143 feet of legs left on the barge there would be plenty of clearage at the various bridges?

A. Correct.

[fol. 169] Q. So the whole tow could be handled without appreciable difficulty?

A. Correct.

Q. Now then, of course, in your capacity as a tower of barges such as this and your capacity as an expert tower, it is necessary to making the deal for you to know the condition of the river at the time the towage was completed?

A. That is correct.

Q. It was necessary for you to know generally the contours of the river and how much water you had at various points and just what you were going to have to do in connection with the handling of the barge?

A. Correct.

Q. You didn't rely on Dixilyn to furnish you any of that information?

A. No, sir, we relied on the U. S. Engineers.

Q. And you relied on Captain Brechtel to have that knowledge.

A. Correct, and he had it.

Q. It was contemplated, was it not, that except for the lowering of the legs upon instructions from Captain Brechtel, that the navigation of the flotilla would be entirely in Captain Brechtel's hands?

A. Correct. That is correct.

Q. Now then, as I understood your testimony a minute [fol. 170] ago, you say that none of your personnel knew anything about the operation of the legs on the drilling barge Julie Ann? Is that correct?

A. That is correct. I don't think any of them had working knowledge of the operation of the legs of the Julie Ann.

Q. Did Captain Brechtel know anything about the operation of these legs?

A. Not to my knowledge.

Q. He had no idea how long it would be taking to lower from one height to another or anything of that nature?

A. He probably had a general knowledge from the past two experiences he had, but I wouldn't say he knew of the rate of travel or anything else. No, I don't think he would have a knowledge of that; would have no reason to.

Q. That would be of no materiality to him as the pilot of the flotilla?

A. That's correct.

Q. Whether it took fifteen minutes to lower the legs a hundred feet or an hour to lower it a hundred feet would not make any difference to the man in charge of the flotilla?

A. No, sir.

Q. So I assume from what you say that Captain Brechtel not only didn't know anything about it, but in handling [fol. 171] the tow you didn't expect him to learn anything about it?

Mr. Kohlmeyer: I submit the question is improper. He is asking for an opinion on whether someone else knew or

did not know, which obviously this witness isn't competent to answer.

The Court: Overrule the objection if he knows.

A. Well, I'd say this: that Captain Brechtel would round the rig up above the bridge and stop it and give the orders to drop the legs. And when they told him the legs were of sufficient height to clear the bridge, then he would proceed under the bridge. Whether that took five minutes or an hour is of no moment to me or Captain Brechtel. All he wants to do is when he gets the all clear signal just go on through the bridge.

Q. It is contemplated in the tow that it would be handled in such a way it would be stopped completely at a point above the bridge until the desired depth on the legs had been obtained?

A. Correct.

Q. And you intended the horsepower you furnished to supply that power?

A. Correct.

[fol. 172] Q. Considering the current and the stage of the river on that particular day?

A. That is correct.

Q. And that is the basis on which you made your recommendation?

A. Correct.

Q. Then if in fact in the actual process of taking this barge through the bridge it was never stopped completely above the bridge until the legs were lowered to the proper depth, it would indicate that you did not have sufficient horsepower on that tow to control it?

A. Would you restate that question?

Q. Yes, sir. You contemplated, as I understand it, that the tow would be stopped completely above the bridge until the legs were lowered to the proper depth to go under the Natchez Bridge?

A. Correct.

Q. Now then, if we assume that the tugs did not in fact hold the tow up above the bridge until the legs could be gotten to the proper depth, but rather continued on down into the bridge and struck the bridge before the legs

reached the proper depth, it would indicate you had insufficient horsepower on the tow?

A. If the rig never did stop and just kept right on coming?

Q. Yes.

[fol. 173] A. And the legs weren't sufficiently low enough to clear?

Q. Yes.

A. I don't know. You've got me at a disadvantage there.

Q. I'm just asking you to assume those hypothetical facts. What would you think would cause that or what would you think would be causing the tugs not to be able to stop the tow above the bridge before the legs struck the bridge if we assume those facts?

A. Well, assuming those facts they never did stop, I don't know. I can't answer. I mean you are putting me in an awkward position assuming facts. It was always my understanding that the rig was stopped.

Q. I'm not asking you to assume what you hear from your employees to be the facts about this lawsuit. I'm asking you to assume the facts which I have given you.

Mr. Kohlmeyer: May I ask that those facts on which Mr. Vickery is asking this hypothetical question be repeated? I think it becomes important at this stage.

Mr. Vickery: I think I have done it twice, but I'll be glad to accommodate.

Q. Mr. Smith, you do, of course, consider yourself to be an expert in the towing field?

A. Correct.

[fol. 174] Q. And you do consider yourself an expert to determine the horsepower necessary to handle any kind of tow on the river or offshore or otherwise?

A. Correct.

Q. Now then, Mr. Smith, assume this state of facts: Assume with me that up above the Natchez Bridge the tugs and tow were turned around so that they were coming back down the river with the stern of the tugs and the stern of the barge Julie Ann to come underneath the bridge first; that they were made up with the Toltec in the center and with the Ouachita on the left hand side

of the Toltec and the Orleans on the right hand side; and that after turning around to head back downstream approximately a half a mile up from the bridge, the Natchez Bridge, that the legs were started to be lowered on the barge Julie Ann, and that it was a continual process of the barge and tugs moving down from that point on until one of the legs of the Julie Ann actually touched the Natchez Bridge and did some damage to it; and that during this period of time the tugs never did hold the barge Julie Ann up until such time as the legs had reached the proper depth. Then isn't the conclusion inescapable that there was insufficient horsepower on these three tugs to control that tow, as you had contemplated they should, in this movement?

[fol. 175] A. Under those circumstances, I would say yes. If they never did check the momentum of the barge, there probably was something lacking. That is correct.

Q. If they not only didn't check it, but didn't absolutely hold it there while the legs were going down, that is true?

A. That would be true under those circumstances.

Q. And if the engine on one of the three tugs went out completely shortly before the flotilla got to the Natchez River Bridge, certainly, at that time with that engine out, you would have to say without reservation that there was inadequate horsepower to control the flotilla, would you not?

A. That is correct.

Mr. Vickery: I believe that is all.

Redirect examination.

By Mr. Kohlmeyer:

Q. In answer to the hypothetical question Mr. Vickery just asked you, you said, I think, that if that set of facts as existed were true, then you would have to conclude that the flotilla was underpowered? Is that correct?

A. Correct.

Q. Included in those facts, will you state what hypotheses you used insofar as speed and height of the legs were [fol. 176] concerned?

A. Speed and height?

Q. Speed of the flotilla and height of the legs.

A. Well, actually that was the controlling factor in the whole thing. The deeper you got the legs in the water, the more current you got to— One boat could handle the Julie Ann easily if the legs were all the way up. You needed the power when the legs started down. That is why we recommended the power. And the deeper the legs got in the water, the more power it took to hold her.

Q. If the legs had been sufficiently far down, Mr. Smith, it is obvious they would not have hit the bridge, of course?

A. Correct.

Q. If the legs had been reported far enough down and if Captain Wood or Mr. Hughes or those in charge of the Julie Ann had reported that they were sufficiently far down to Captain Brechtel and Captain Brechtel had said, "O.K., we'll go on through the bridge," and if the legs were in fact not as far down as had been reported, would there be any fault on the part of the flotilla?

Mr. Vickery: This is the ultimate conclusion that the Court has to reach in this case, and he is asking this man [fol. 177] to express an opinion upon the ultimate decision of this Court, and I think it calls for a legal conclusion.

The Court: I'll let him answer the question for the record, but I will sustain the objection and exclude it from consideration.

Mr. Kohlmeyer: It's the same question Mr. Vickery asked. He asked a hypothetical question that there was only one answer to.

The Court: You didn't object to it, and I let it go in. I think those are questions for the Court to ultimately determine. Now, of course, the question on cross examination did not call for the ultimate conclusion of the lawsuit, but asks his expert opinion upon one phase of alleged negligence. That seems to be admissible, but I'm very doubtful about that. I'm going to let him answer your question for the record, but I'm going to sustain the objection and exclude it from consideration because I think it calls for his opinion upon the ultimate decision of the Court. It is for the Court to determine whether or not it was negligence. I'll let him answer for the record.

A. I would say this: that if after he rounded that tow up and was holding up slow to the current and dropping down [fol. 178] toward the bridge, if he had the O. K. that the legs were proper depth, there was no reason for him to ever actually stop the tow, and he could have come right on through the bridge.

Q. And of course if the leg was not sufficiently far down, he would have hit the bridge?

A. Correct.

The Court: I believe I will change the ruling. I'll overrule the objection and let it go in, and it will be considered with all the other evidence that may be introduced by the other side.

Q. Now, Mr. Smith, assuming that these legs were down 45 to 55 feet below the surface of the river, and assuming that the river was at a stage where you had a current between four and five and a half miles per hour; assuming he has three towboats or tugs facing upstream with the rig dropping downstream under the bridge; assuming, if you will, that you called for a double hook-up of full power on the tugs, will you state, if you know, what the effect would be of that maneuver on the trim of the rig fore and aft?

A. With those pontoons on the bottom of those legs sticking down 45 to 55 feet below the water surface, you would have a tendency to tip that rig; with that pointed upstream, [fol. 179] you have got a minimum of buoyancy, and with all the drag under the water, you would have a tendency to tip her down by about the head.

Q. In other words, the upstream end of the rig would have a tendency to go down in the water, and the downstream end of the rig would have a tendency to come up in the water? Is that correct?

A. Correct.

Q. That is a normal physical fact?

A. That is correct.

Q. In the course of your operation of the flotilla downriver, particularly at the time when it was passing under a bridge, was it ever contemplated the Crescent personnel would have anything to do with the operation of the legs?

A. No, sir.

Q. Were any Crescent personnel aboard the rig to take readings of the legs?

A. No, sir.

Q. Do you know who was on board as an employee on the payroll of Crescent?

A. Captain Brechtel.

Q. He was the only one?

A. The only one.

Q. Now, in answer to several of Mr. Vickery's questions relative to the recommendations as to horsepower and the [fol. 180] agreement thereon, I think you stated that the three officers of Dixilyn relied on you insofar as your expert knowledge was concerned on moving the rig? Is that correct?

A. Correct.

Q. Will you state, if you know, Mr. Smith, what the qualifications of Mr. Wood and Mr. Blakely were?

Mr. Vickery: Our running objection, in view of the fact that I don't consider them our employees and in any way binding on us.

Mr. Kohlmeyer: This is a lawsuit involving—one of the questions will be the efficacy of this horsepower that was put on this rig. We go to a meeting here at which—

The Court: —I'll overrule the objection for the same reason I did before.

A. Mr. Woods and Mr. Blakely had effected probably the move on all four of the rigs that had come down previous to the Julie Ann.

Q. Do you know who Blakely was?

A. Blakely is an Englishman with a degree in naval architecture or marine engineering from Oxford or one of those big universities over there, and he practiced over here with Freedy and Goldman, Naval Architects in New Or- [fol. 181] leans, and then he went with Mr. Woods in the surveying business. Obviously a very educated man.

Q. What was their knowledge of the ability of the proposed horsepower as opposed to your knowledge, Mr. Smith?

Mr. Vickery: I think that is a question that would be impossible for this man to answer.

The Court: Sustain the objection to that.

Q. What was the function of Mr. Wood and Mr. Blakely at a meeting such as was called?

A. Their function was to be advisors to Dixilyn's people as well as the underwriters for the rig.

Q. You didn't ask them there at all?

A. No, sir. We found them there when we walked in.

Q. You didn't know they were going to be there?

A. Had no idea.

Mr. Kohlmeyer: That is all.

Recross examination.

By Mr. Vickery:

Q. I just want to be sure I understand, Mr. Smith. Are you now trying to say directly or indirectly to the Court that you abdicated your function as the expert tower in this case to Mr. Woods and Mr. Blakely?

[fol. 182] A. To everyone present.

Q. Sir?

A. No.

Q. You are not trying to leave the impression with the Court you turned over your job as the expert tower and as the expert in charge of this flotilla to Mr. Wood or Mr. Blakely?

A. No, sir. They were experts themselves, and they just concurred in what I had recommended.

Q. And you still retained your position in the whole job as the expert in charge of towing this rig down from Vicksburg?

A. That is correct.

Q. And you didn't expect Mr. Blakely or Mr. Wood to take over your job as the expert in charge of this tow?

A. No. I don't think Mr. Blakely or Mr. Wood were qualified to navigate the tow down.

Q. I was interested in one other thing, and I just want to clear it up, because I misunderstood your answer to one

of my questions, if I heard your answer to Mr. Kohlmeyer correctly. Did you say that none of Crescent's personnel had anything to do with the lowering of the legs?

A. The physical lowering of the legs, no, sir.

Q. That is the point I want to make. But it was Captain Brechtel's duty in charge of the flotilla to tell Dixilyn [fol. 183] employees when it was safe to lower the legs? Isn't that true?

A. That is correct.

Q. In other words, they couldn't start lowering the legs until Captain Brechtel told them he had the flotilla in such a position and under such control that it was safe to do so?

A. There again we get into a question that Brechtel's authority did not supersede Dixilyn's authority on their own there. They could have thrown Brechtel off any time they made up their mind to. He was there to advise them when to start lowering the legs. We have no control over that as such. He advised them when to drop them and they advised him when they were low enough to clear the bridge.

Q. It was Brechtel's basic job to advise them when the flotilla was in such a position in the river it was reasonably safe to lower the legs?

A. That is correct.

Q. And if Dixilyn was carrying out its phase of the job in the overall towing operation, they would have relied on Brechtel as the expert pilot with knowledge of the contours of the river and wait until he gave them the word?

A. Right.

Q. Now then, as I understand it, you don't have any in- [fol. 184] formation and didn't have at the time you suggested this horsepower, with respect to the size, shape or construction of the legs on the Julie Ann? Is that right?

A. Pardon?

Q. At the time you suggested the horsepower to be used in handling this tow, you didn't have any idea with respect to the size or the shape or the construction of the legs on the Julie Ann?

A. Oh, yes, we did.

Q. You had that information?

A. Yes, we were furnished a booklet on that rig when we went to the meeting.

Q. You had full knowledge of the construction of the Julie Ann at the time you suggested this horsepower?

A. Yes. She was practically a duplicate of—except the longer legs—outside dimensions were the same except she did have longer legs.

Mr. Vickery: I believe that is all.

Re-redirect examination.

By Mr. Kohlmeyer:

Q. If Mr. Blakely or Mr. Wood had said that they wanted more horsepower than you suggested, would you have acceded to their request?

[fol. 185] A. Yes, sir.

Q. Did it make any difference to you how much horsepower was used?

A. No, sir. Dixilyn was going to pick up the tab in the final analysis. My personal pride would not have been hurt if they had recommended more power. We would have just made it available to them.

(Witness excused.)

* * * * * * * *

[fol. 186] Warren Apgar, called as a witness and having been duly sworn, testified as follows:

Direct examination.

By Mr. Kohlmeyer:

Q. You are Mr. Warren C. Apgar?

A. Yes, sir.

Q. You live in New Orleans?

A. I do.

Q. You are the vice president of Crescent Towing and Salvage Company?

A. Yes.

Q. And you are also vice president of various other of the Smith enterprises in New Orleans?

A. Yes, I am.

Q. How long have you been in the shipping business, Mr. Apgar?

A. Since 1935.

Q. With whom?

A. I started out with Lykes Brothers Steamship Company, and I spent five years in the Army in the Water Division, and then was in the steamship business in New York for five years and then returned to New Orleans and was in the tank terminal business for two years, and went with Crescent Towing and Salvage Company and T. Smith [fol. 187] and Son in 1950 and have been with them since.

Q. Are you familiar with the operations of Crescent insofar as the towing is concerned?

A. Yes, I am.

Q. Are you familiar with your competitors in the area?

A. Yes, I am.

Q. State, please, for the record what your competition is in and about the harbor of New Orleans and upriver as far as Memphis.

A. Well, our competition is roughly in two phases. We have our harbor competition, which was Whiteman and Bisso—Edwin Bisso and Willie Bisso—and then we have tidelands competition, and we have the tideland oil fields. We compete with G and H Towing Company, Harry L. and J. Ray McDermott, and many other small companies operating vessels of lower horsepower than ours. The harbor towers make various trips up the river, principally in connection with movements in and out of New Orleans from upriver ports from time to time. It doesn't happen too often.

Q. Crescent is not certificated or regulated as a carrier?

A. No.

Q. It has no regular runs?

A. No, we have no regular runs.

Q. Do you know anything about the upriver business of [fol. 188] the towboats on the river?

A. I have a general knowledge of that business.

Q. How many towboats would you say are of the class of the Ouachita or the Toltec that might have been used in this movement or that were available to be used in this movement?

A. Well, there are roughly many hundreds of them more or less of the Ouachita type. There are fewer of the Toltec type. However, as to the availability, you catch them as they come by with their tows or that are available in between their regular runs.

Q. It is a question of availability and the spot, and the nature of the towage, rather than the availability of the vessel itself?

A. That is correct.

Q. And there are many hundreds of these same types of vessels about the river?

A. Right.

Q. —that could have done the work if they had been in the Vicksburg area?

A. Right.

Q. And if they had not been in the Vicksburg area, you could have gotten them, but you would have had to pay sailing time?

A. That's correct.

Q. That is true of the harbor tugs?

[fol. 189] A. The harbor tugs you have even greater flexibility because you have shorter distances.

Q. Are you familiar with the negotiations that led up to the movements of the Dixilyn from Vicksburg to New Orleans?

A. Yes, sir.

Q. Are you familiar with the contracts that were finally —of the letter exchange that was finally consummated between the two companies?

A. Yes, sir.

Q. As a matter of fact, you wrote the letters of December 19th and December 23rd, did you not?

A. I did.

Q. Were you present at the meeting referred to in the letter of December 19th at Dixilyn's office in New Orleans?

A. Yes.

Q. Who was present?

A. Mr. Boring, president of Dixilyn Drilling Company; and Mr. Brigham, executive vice president of Dixilyn; Mr. Tidwell, Mr. Brigham's assistant, I believe; and Mr. Charlie

Wood and Mr. Blakely, who were introduced to us as marine surveyors representing underwriters.

Q. Who called the meeting? Do you know?

A. Yes. I was either called by Mr. Brigham or Mr. Tid- [fol. 190] well and told that Mr. Boring was in town and it would be a good time to come over to discuss the tow from Vicksburg.

Q. Did you know that Blakely and Wood would be there when you got there—before you got there?

A. No, sir.

Q. Did you know anything about their insurance before you got there?

A. No, sir.

Q. Will you state, please, briefly—because I know you were in the room when Mr. Smith was testifying—what happened at that meeting insofar as the conversations and negotiations were concerned?

A. Well, of course, first of all we talked about as to when the rig would be ready to move down, and it was quite a bit of discussion about that because, as you know, it started out on the 26th, the day after Christmas. That was discussed, and then the question of horsepower was discussed principally between Mr. Smith and Mr. Blakely and Mr. Wood. We had, before coming to the meeting, we had just a general idea as to this Dixilyn rig, since it was bigger than any other rig we brought down, and we had not seen any blueprints or any other—had anything else but a general conversation over the phone about it with [fol. 191] Mr. Tidwell or Mr. Brigham, and we had shown to us the brochure they put out, and Mr. Mike Smith gave Mr. Blakely and Mr. Charlie Wood our ideas as to the power to be used in the tow, and in this connection Mr. Wood or Mr. Blakely suggested that the Ouachita was in the area there at Vicksburg and did we contemplate using her, and we said we did. And we also told them that we would use the Orleans and contemplated using a tug of the horsepower 3600 to four thousand, and asked them if that was in their opinion sufficient. And they agreed that it was, and we told them we would attempt to get the Toltec. However, a lot of it depended upon the position of that vessel as it related to her regular run. Then the question

was brought up by Mr. Wood or Mr. Blakely with Mr. Smith as to whether or not Mr. Brechtel would be along running our end of the operation, and we told him that he would be. Then we discussed where we would tie up the drilling rig in New Orleans and also could we help them with regard to—I don't know whether it was the registration and documentation of the Dixilyn rig at the custom house, since we have an agency department in connection with our stevedoring business, and we said we would be glad to do that. And we also told them we would [fol. 192] get them some names of Coast Guard people and port people that could be invited to the christening ceremonies. I brought up the question of the agreement for bringing the rig down and mentioned that, as customary, we would have to have a tower's release clause, and Mr. Boring at that point said, "Well, we won't discuss that now. We just want to get these general facts behind us and line up the tow down here. The technicalities can be discussed at a later meeting."

Q. Do you recall a discussion about taking some part off the legs?

A. Yes. It was during the conversation with Mr. Smith and Mr. Wood or Mr. Blakely, and Mr. Smith suggested sixty feet, and Mr. Brigham at that point said, "They are going to have thirty feet off." And then Mr. Wood and Mr. Blakely discussed with Mr. Smith as to how that would affect the tow, and it was agreed by Mr. Wood and Mr. Blakely that thirty feet would be sufficient, and we went along with that.

Q. Was the horsepower of the various vessels which were contemplated discussed by the three Dixilyn officials that were there?

A. I don't recall that it was.

Q. They took no part in that, to your recollection?

[fol. 193] A. No, not to my recollection. That was left with Wood and Blakely.

Q. But they did agree that the horsepower suggested was proper?

A. Yes.

Mr. Vickery: You mean by "they," Wood and Blakely?

Mr. Kohlmeyer: Yes.

The Witness: Wood and Blakely.

Q. With no dissent from Dixilyn?

A. Oh, no.

Q. After that meeting, did you write any letters to Dixilyn?

A. No, I did not write them until after the second meeting that we had in their office.

The Court: This is a good place for a ten minute recess.

(Whereupon the hearing was recessed for ten minutes.)

After Recess

Mr. Kohlmeyer continues:

Q. Mr. Apgar, I believe we were up to the point as to the [fol. 194] letters that you wrote. Did you write letters dated December 19th and December 23rd to Dixilyn?

A. Yes, sir, I did.

Q. Those are the letters that have already been identified that you are familiar with, of course?

A. Yes, sir.

Q. Following your second letter of December 23rd, did you receive back from Dixilyn a copy signed, "Approved, Dixilyn Drilling Corporation, by Russell B. Tidwell"?

A. I thought you wanted me to tell about the second meeting.

Q. No, just answer that question first. Did you receive back the letter of December 23rd signed by Mr. Tidwell as I just asked you?

A. Yes, sir.

Q. Now, let's go back then, Mr. Apgar, and talk, before we get to the letter writing, about the second meeting that you had. I think that meeting took place sometime immediately prior to the 19th of December?

A. Yes, sir.

Q. Who was present at that meeting?

A. This was the meeting that was called at a suggestion of Mr. Boring in the first meeting, at which we were to discuss the towage release aspects of this operation, and

[fol. 195] I was called by Mr. Tidwell and asked to come over on a particular afternoon; and Mr. Landman, who is now deceased, who was vice president of Crescent at that time, who was handling insurance matters for Crescent at that time, went with me, and we got over into Dixilyn's office and found Mr. Tidwell; Mr. Giffin, G-i-f-f-i-n, president of the Southern Marine and Aviation Underwriters; and Mr. Stentz, who was vice president of Southern Marine and Aviation Underwriters; who were introduced by Mr. Tidwell as underwriters of the rig Julie Ann. And the conversation was principally between our Mr. Landman and Mr. Stentz and Mr. Giffin.

Q. Was Mr. Tidwell present at all times?

A. Yes.

Q. And all conversations were within his hearing?

A. Oh, yes.

Q. Proceed.

A. And it was our intention that we have a towage release clause that would relieve us of any and all liability in connection with the tow of the Julie Ann from Vicksburg to New Orleans, as was customary in the past, towing this type of rig.

Q. Is the towing of this type of rig particularly dangerous or particularly hazardous?

[fol. 196] A. Yes. In the first place, it is an unusual sized object, and with those legs and having to go through, I think, three bridges, and with the river traffic, we felt that it's an extremely delicate operation to bring that type of unit that far in the more or less confined waters.

Q. In no sense of the word is this an ordinary towage movement?

A. We didn't consider it so, which was the reason we required the towage release clause. The upshot of the meeting was that Mr. Giffin or Mr. Stentz suggested that we return to the office and submit to them our ideas as to—and submit our ideas as to the towage release clause, which occasioned my writing a letter of December 19th, after consultation with our attorneys and Mr. Landman.

Q. After you wrote the letter of the 19th, did you hear from Tidwell or anyone else in the Dixilyn organization?

A. Yes. Mr. Tidwell called back and said that the attached clause was not—the clause that we had attached to the letter of December 19th was not to the liking of the Southern Marine and Aviation, and that he was not an insurance man and would not object to talking to Mr. Stentz. I phoned Mr. Stentz, and he suggested another clause which [fol. 197] he—I don't recall whether he gave it to me over the phone or sent me a copy of it—In any event, after receiving this clause, I discussed the clause with our admiralty attorney and Mr. Landman, and we wrote Dixilyn again on December 23rd and elaborated somewhat on Mr. Stentz' clause. This is known as the first letter of the 23rd. And I then received a call from Mr. Stentz saying that he did not like the first sentence in there and—I'm not an insurance expert either, but as I recall the reason he did not like it was because he said if that sentence remained in there, that if one of our tugs had an accident on the way to Vicksburg that Dixilyn would be responsible. But, of course, that wasn't our idea at all to have them responsible until they actually got hold of the rig. So we agreed to delete it, and the second letter of the 23rd was submitted without the first sentence and was submitted to Dixilyn and was approved and signed by Mr. Tidwell and returned.

Q. Now, Mr. Apgar, in the course of the second meeting with Mr. Tidwell, Giffin, Stentz, you, and Mr. Landman, was there a discussion as to the release clause and what was to be released in that clause?

A. Yes. It was put forth by Mr. Landman that we had to [fol. 198] have a complete release from all third party liability and from the negligence of our employees or any other, any and all reasons. A complete release.

Q. Did Mr. Tidwell object at all to that type of course?

A. No, sir. I might say here that in both meetings that insofar as the technicalities of the tow and other insurance, Dixilyn appeared to be completely guided by the Southern Marine and Aviation representatives, marine surveyors, and their insurance people.

Q. Did you know what insurance Dixilyn had on the barge prior to the time you had written the second letter?

A. That came up in the discussions with Mr. Landman and Mr. Stentz and Mr. Tidwell, and that there should be

insurance at least to the value of the rig. As I recall, it was four million dollars.

Q. Prior to the time you went into those meetings, did you have any notice at all or knowledge at all of the insurance that existed on the rig?

A. No, sir.

Q. Had you any knowledge as to the place or the part that Southern Marine and Aviation played in placing the insurance?

A. Well, we understood that they were Dixilyn's underwriters. That's all.

[fol. 199] Q. Do you know there were excesses on top of excesses?

A. No.

Q. Do you know who the primary carrier was?

A. No, sir. We didn't know any of the details.

Q. Did you ever see any of the policies as of this time?

A. No, sir.

Q. Copies of them?

A. No, sir.

Q. No cover notes either?

A. No.

Q. You didn't see any policies before the movement of the rig?

A. No, sir. We just had these conversations with Giffin and Stentz, and it was obvious from the talks that the rig was covered.

Q. Now, Mr. Apgar, you carry at least in excess of fifty thousand dollars P & I and Hull with collision clause and tower's liability on the Orleans, do you not?

A. Yes, sir.

Q. Do you know the amount of the premium you pay for that?

A. No. We have a fleet policy, and I guess it could be broken down tug by tug. We pay a percentage on the valuation of the fleet.

Q. But you don't know that offhand?

A. It's in the neighborhood of between five and six percent.

[fol. 200] Q. On the value of each of your tugs?

A. Yes.

Q. For both P & I and Hull? —Well, let me ask you—

A. —I'm not sure.

Q. If we want to get that information, that can very easily be determined through your brokers in New Orleans?

A. Yes.

Q. And an accurate statement of the cost of your insurance can be obtained and submitted to the Court and to counsel?

A. It can be.

Q. And you will do that if we ask you to?

A. Yes.

Q. Do you have any idea as to the type of cover that is afforded by your P & I and collision clause and do you know generally what those clauses mean?

A. Yes, I do.

Q. Do you know how your rate is computed?

A. Yes.

Q. State briefly, if you will, to the Court how your and, in general, how all marine insurance rates are computed.

A. Well, it's computed, I guess, as almost all insurance is generally computed, and that is on your experience. [fol. 201] And if we have several bad years, our insurance costs go way up. I mean by that, they are liable to go up from, say, four percent to six or seven percent, depending upon the seriousness of the losses.

Q. When you say "losses," you mean damage claims?

A. Damage claims and reserves and so on.

Q. Do you know who was on the tug Orleans at the time of the collision with the bridge?

A. No, sir.

Q. Do you know if Brechtel is still in your employ?

A. He is not.

Q. When did he separate? Do you know, just approximately?

A. About a year ago.

Q. Was it voluntary or involuntary?

A. It was voluntary.

Q. Do you consider him a capable master?

A. Yes, we do.

Q. Thank you. That is all.

* * * * * * *

[fol. 204] Cross examination.

By Mr. Vickery:

Q. Mr. Apgar, as I understand your testimony at this time, the sole agreement you had with Dixilyn Drilling Corporation with respect to moving this towage in tow, insofar as any release of liability of Crescent is concerned, is embodied solely in the second letter of December 23, 1957?

A. No, sir. It encompasses the letter of December 19th, as the second letter states in the first or second paragraph.

Q. I understood after the second letter of December 19th that Mr. Tidwell called you and told you that letter or the clause attached to that letter was not acceptable to Dixilyn. Is that correct?

A. The clause was not acceptable. However, there is another part of the first letter that we very definitely understood would be part of the agreement, and that is that we would be included in Dixilyn's coverage.

Q. That you would be named an additional assured in their policies?

A. Yes, sir.

Q. You requested them to furnish you proof of that, did you not?

A. Yes, sir.

[fol. 205] Q. And the normal and routine thing to do if that provision is to remain in force and effect is for you to decline to furnish the tow until you have been furnished that proof?

Mr. Kohlmeyer: I object. I don't know of any normal provision. If there is complete trust on both sides, I don't see why there should be a written confirmatory agreement. I don't think it customary at all.

The Court: Overrule the objection.

A. We felt that we were dealing with people that we could trust and they understood that through the conversations that we had had, and to call them up and— You see, that letter was written on December 23rd, and to call them up on Christmas Eve and say, "We are not going

to handle your tow because you haven't given us a certificate," I think would have been highly impractical, because we had to get the tugs going to be up here for the day after Christmas.

Q. Let me ask you this, Mr. Apgar. Then it is not your policy, notwithstanding your request, as reflected by your letter of December 19th, that you be furnished either a letter or a telegram confirming this, it is not your practice [fol. 206] to follow up on that? You just throw that in for so much lagniappe? Is that right?

A. If we had had time to follow up on it, we might have done so.

Q. You had from the 19th to the 26th, seven days.

A. No, we didn't have that long. We didn't have a signed agreement until probably the 24th, which is the day before Christmas, and how he would get us certificates and everything wrapped up over there on Christmas Eve— You know what it's like on Christmas Eve.

Q. Mr. Apgar, I want to be sure I'm clear as to what you say the contract was between Crescent and Dixilyn with respect to the letters of December 19th and December 23rd.

A. The only thing—

Q. —Here's a letter of December 19, 1957. Will you tell me what parts of that letter, if any, you considered to be a part of the contract, insofar as it might relate to any release of your liability?

Mr. Kohlmeyer: I submit this is highly improper questioning. It invokes the province of the Court; it is for the Court to decide. This question of the interpretation of the [fol. 207] letter was brought up by the respondent, by Dixilyn, and not by us; and the question of what is included and what is excluded from the written letter, I submit, is certainly not within the province of the witness to testify to. It is up to the Court to determine.

The Court: Overrule the objection.

A. I don't mind answering the question. It was the attachment here that was superseded. This attachment was superseded by the clause in the signed letter. It was superseded by the second and third paragraphs. And that second and third paragraph simply supersede the attached

clause on the letter of December 19th, as it points out very clearly in the letter where it says, "This portion of our agreement . . ."

Q. Now then, so everything in the letter except the copy of the towage release clause—

A. —which was attached.

Q. —which was attached, insofar as the letter of December 19, 1957, is concerned, you considered to be accepted by Dixilyn?

A. Yes, sir.

Q. Now, let me ask you this, Mr. Apgar. Why did you consider it was necessary to have Dixilyn sign the letter [fol. 208] of December 23rd evidencing their approval of it, and yet you were willing to accept their oral approval of the letter of December 19th? That is rather unusual, isn't it?

A. No, because the letter of December 23rd tied in the letter of December 19th.

Q. I see. So your practice simply is to confirm conversations you have with respect to movements such as this by letter such as that one of December 19, 1957, without requesting anyone to accept or assent with respect to that letter? Is that your normal practice?

A. Yes.

Q. Yet you felt it was necessary as to the December 23rd letter that it be signed and approved? Is that correct?

A. If the December 23rd letter was the final letter, would have had to be signed and approved, but it was followed by the letter of December 19th which tied in the letter of December 23rd—which December 23rd letter followed up the letter of December 19th, and the letter of December 23rd tied in with the letter of December 19th; so by signing the letter of December 23rd, they agreed to the letter of December 19th.

Q. I see. Even though the letter of December 23rd said [fol. 209] "If the foregoing meets with your approval and represents this portion of our agreement . . ." you considered the assent on December 23rd to be an assent to the letter of December 19th too?

A. Will you restate that?

Q. The last paragraph in the letter of December 23rd says, "If the foregoing meets with your approval and represents this portion of our agreement, please sign and return to us the attached three copies of this letter." Are you trying to say the approval on the 23rd letter also amounts to approval of the provisions in the letter of December 19th?

A. It does, with the exception of that portion which, as I stated before, the portion referred to was the attachment to the letter of December 19th.

Q. Now, is it fair summation, Mr. Apgar, to say that what you, in consultation with your attorneys—I assume, Mr. Kohlmeyer,—

A. That's right.

Q. —were trying to do in drawing up these various clauses which you submitted to Dixilyn after they had been approved by Mr. Kohlmeyer— Is it fair to say that what you were trying to do was to relieve Crescent Towing and Salvage Company of any and all liability they might [fol. 210] have for any and all damages that might arise out of this towage operation?

A. That is correct.

Q. Whether caused by your negligence or otherwise?

A. That is correct.

Q. Without any reservations?

A. Exactly.

Q. Even if Brechtel had gone berserk or had come on the job in such a shape he couldn't handle it and had intentionally run into the bridge?

Mr. Kohlmeyer: I submit the hypothetical question is improper.

Mr. Vickery: I withdraw it. It was poorly phrased, Your Honor. I withdraw it.

The Court: All right.

Q. Even if there had been some intentional damage by your pilot, which might seem incomprehensible?

A. We wouldn't have been hired by Dixilyn if they thought we were capable of mishandling, to send a drunken man on the boat.

Q. I'm asking you what you tried to do with this contract insofar as traffic liabilities were concerned, and I believe you told us you were trying to relieve Crescent of [fol. 211] any liability, however it might be sustained.

A. That's right.

Q. And that included any intentional damage your tug people might do?

A. Included any and all damage.

Q. Including intentional negligence and otherwise?

A. Correct.

Q. Now then, Mr. Apgar, you never had any conversations at all with Dixilyn's people with respect to the rates that were to be charged in connection with this movement, did you?

A. No, because the only rate we could give them definitely was the rate on the Orleans, and we didn't know just what tugs we would be able to get at the time for this movement. We had hoped, of course, we would get the Ouachita and Toltec, but at the time of the meetings we did not know definitely we would be able to get those vessels.

Q. And they left the question of the rates and the amount of money to be paid for the tows to be used in this operation entirely in your hands, did they not?

A. We told them that we would do the very best we could do on that, yes.

Q. They left it entirely in your hands, didn't they?

A. Yes, they never questioned that phase of it.

[fol. 212] Q. Never questioned it. In fact, they had no knowledge until they got your invoice as to how much this movement was going to cost them?

A. Yes, we assured them whatever— We would make sure these charges were reasonable.

Q. I'm talking about dollars and cents. They had no idea what it would cost in dollars and cents to make the movement?

A. I don't know whether they did or not. We didn't give them any idea that I recall.

Q. Now then, what rate did you charge on the Orleans per hour?

A. Thirty-five dollars.

Q. That is your usual and customary charge on the Orleans?

A. Yes, sir.

Q. Regardless of what kind of contract you may have in connection with the use of that vessel?

A. It's for— Thirty-five dollars an hour is for a normal operation with the Orleans.

Q. Whether you furnished the insurance or somebody else furnished the insurance, your normal charge for the tug Orleans is thirty-five dollars an hour, isn't it?

A. It depends again here on the type of operation. If it's an extremely risky operation, the charge per hour if we [fol. 213] provide the insurance would be considerable more. If it's a normal type of operation, the thirty-five dollars would apply with us supplying the insurance.

Q. Did you mention any difference in rates that would be charged to Dixilyn at the time you were talking to them about this contract?

A. No, we told them we would charge the normal rates.

Q. Now then, Mr. Apgar, let me ask you this. Assume that you had not been able to get Dixilyn's acquiescence to any of the clauses whereby you attempted to relieve yourselves of liability for any damages that might have been sustained, would you then have had to go to your underwriters and ask them to write you a policy covering the tug Orleans on this tow and pay them an extra premium for it?

A. What we probably would have done, we would have gone to our underwriters and asked them to write a special policy for this tow so that if there was any accident that it would not go against our experience.

Q. You don't have any idea what that policy would cost?

A. I imagine it would cost probably ten percent of the craft to be towed.

Q. That is a rough approximation?

A. No, because we just had that recently in connection [fol. 214] with towing another drilling rig.

Q. I see. Now then, Mr. Apgar, do you have anything at all to do with the arrangements of the Toltec—

A. —I'm sorry. Excuse me. It was one percent; not ten percent, because it seemed like such a fabulous amount. It was one percent for the one trip.

Q. Now then, Mr. Apgar, do you have anything to do with the arrangements to be made for the Ouachita or the Toltec?

A. Yes. I talked to Mr. Jack Neilson, who made those arrangements for us.

Q. Did you in arranging those two tugs to assist in this towing operation get any quotations with respect to the rates they would charge on the basis of whether their insurance was likely to be involved or not?

A. No, sir, we didn't, because they made it clear to us that they would look to us in the event of any damages.

Q. So you didn't solicit a different quotation in rates insofar as those two tugs were concerned?

A. No, sir, we felt we were fortunate in getting tugs as good as that for this job.

Q. I see. Now then, this was the normal— The rate you paid for those two tugs was the normal and routine charge those two tugs made in connection with their usual opera-
[fol. 215] tions?

A. Yes, that was a normal charge for that size tug, yes.

Q. That size tug.

A. Those towboats.

Q. There was never any quotation or any indication given to Dixilyn of any kind that it would cost them so much to move this rig if they bore the brunt of the insurance and it would cost them so much more if you bore it?

A. That question never arose.

Q. You never attempted to give them a choice as to which way they wanted to do it?

A. They never indicated they wanted a choice.

Q. Now then, Mr. Apgar, this last letter of December 23rd which was finally sent to Dixilyn and approved by them, that was drafted, was it not, with the advice and counsel of your attorney?

A. I talked to the attorney before I sent it. It was drafted, that clause we were discussing, was drafted by Mr. Stentz and in consultation with Mr. Landman and myself.

Q. Now, Mr. Apgar, in any of your conversations with your attorney in connection with this particular clause and the drafting of it, were you advised that in order for a towing company such as you to be relieved of all your lia-

[fol. 216] bility, including that of negligence, that it had to be clearly and unequivocally spelled out in the contract?

A. Sir?

Q. Were you advised in connection with the drawing up of this contract where you were attempting to relieve yourself of any and all liability, including that for your own negligence or the negligence of your own employees, were you advised by your attorney that in order to do that, such an agreement to relieve you of your liability for negligence had to be plain and unequivocal?

A. I assumed that it was, and I don't know that I asked that particular question, but in order that both parties might understand it, I assumed that such a clause was necessary. I remember that my attorney made a big point of it. I think it was mutually understood.

Q. You were familiar with the fact that in order for the clause to have any validity at all, a release for your liability of negligence has to be spelled out in the plainest of words? Are you familiar with that requirement?

Mr. Kohlmeyer: I submit that is a question of law.

The Court: Sustain the objection.

[fol. 217] Q. Mr. Apgar, as I understand it, the barge Julie Ann was bigger than either of the previous two rigs which Crescent had brought down from Vicksburg?

A. Yes, sir. The legs were bigger. I'm not a technical man, but the legs were bigger, and I understand it had heavy machinery on it, but insofar as the barge section was concerned, I don't know that the barge part was bigger.

Q. But you were aware of the fact that it was a bigger tow than had been handled previously?

A. Yes.

Mr. Vickery: I believe that is all at this time.

The Court: You may stand aside, Mr. Apgar.

* * * * * * *

[fol. 354] HARRY BRIGHAM, called as a witness and having previously been sworn, testified as follows:

Direct examination.

By Mr. Watkins:

Q. Are you Mr. Harry Brigham?

A. That's right.

Q. Are you the same Mr. Brigham who was called as an adverse witness earlier in this case?

A. I am.

Q. Mr. Brigham, you, I believe, are the executive vice-president of Dixilyn Drilling Corporation?

A. That's right.

Q. Is Mr. Russell Tidwell an officer of Dixilyn Drilling Corporation?

A. No, sir.

Q. Please tell the Court whether Dixilyn Drilling Corporation employed Mr. Charles Wood to do anything in con-
[fol. 355] nection with the movement of the Julie Ann?

A. No, sir, we did not. Charlie Wood's company, as has been previously stated, is a marine surveyor, and his attendance on the vessel— Let me back up. They had Mr. Blakely during the construction of the vessel in attendance to assure themselves that the construction was satisfactory.

Q. Who had Mr. Blakely?

Mr. Kohlmeyer: At this time we should like to object to any evidence which would tend to show or attempt to show that Mr. Wood and Mr. Blakely were not the representatives of Dixilyn, on the theory of estoppel and a holding out to that extent. I understand, of course, Your Honor may not be able to rule on that at this time, but we want to preserve our rights.

The Court: Very well. I'll overrule the objection and give you a standing objection to testimony of that nature because there has been testimony with reference to their conduct, and I think it competent to show just exactly what the status of Mr. Wood and Mr. Blakely was.

Mr. Watkins: And we objected throughout the trial to his testimony on the ground he was not our representative.

[fol. 356] A. Following the completion of the vessel then, their attendance on the vessel was, as is described, accident prevention control, merely to report on any happenings to their employers.

Q. Who is their employer?

A. Southern Marine nd Aviation Underwriters.

Q. Tell the Court, Mr. Brigham, whether Dixilyn Drilling Corporation authorized Mr. Charles Wood to exercise any control over the movement of the Julie Ann from Vicksburg to New Orleans.

A. No, sir, we did not.

Q. In any negotiations with Crescent for the movement of the Julie Ann, did you intend for Dixilyn to protect Crescent from the results of Crescent's negligence?

Mr. Kohlmeyer: We submit that question is highly improper; as to what his intention was is of no material relevancy.

The Court: Overrule the objection.

A. No, sir, we did not.

Q. Did you authorize Mr. Tidwell to enter into any such agreement?

A. No, sir, I did not.

Q. Why did you permit Mr. Tidwell to approve what has [fol. 357] been introduced as an exhibit, the letter of December 23, 1957, from Crescent to Dixilyn?

Mr. Kohlmeyer: The question of Mr. Brigham's subjective frame of mind as to why he permitted someone to sign something, we submit, is of no materiality.

The Court: Overrule the objection. As I see it, he is leading up to the authority, probably, of Mr. Tidwell.

Mr. Kohlmeyer: He has already testified he had that authority.

Mr. Watkins: It is a question of intent. He has gone into great detail as to what their intent was.

The Court: Overrule the objection. I'll let him answer.

Q. My question was why you permitted Mr. Tidwell to approve the letter of December 23, 1957.

A. This is the letter that had his signature on it after the first one was submitted?

Q. Yes, sir.

A. The reason that was approved, or it was approved for him to sign, it was our understanding that— This is his report to me, of course—that—

[fol. 358] Mr. Kohlmeyer: —It would be highly hearsay.

The Court: Overrule the objection. A lot of hearsay has gone in between the various parties. I want the whole story now.

A. —That he had consulted with Mr. Stentz or Giffin—I don't know which—of Southern Aviation Underwriters, and was advised that the letter in itself, or the contents of the letter, that it was not legally enforceable and it was permissible to go ahead and sign it, that if that's what they wanted, it was perfectly all right.

Q. Mr. Brigham, did the negotiations between Crescent and Dixilyn in December, 1957, have anything to do with the lengths of the legs on the Julie Ann on the trip down the river?

A. No, sir. I think, as my testimony the other day, that in the discussion of the size of the vessel and the conditions under which it would be brought down the river, that it was stated that at that time there would be thirty feet of leg added after it reached the New Orleans area, and that the derrick would be completed at that time; where, when it left Vicksburg, there was only the starting legs up on the derrick, and the rig or equipment would be completely outfitted after reaching New Orleans.

[fol. 359] Q. At the time of those negotiations between Crescent and Dixilyn in December, 1957, would there have been time remaining to make any changes in the specified length of the legs before leaving on the 26th of December?

A. No, sir. I might state this: that additional thirty feet of leg represented one hundred thousand dollars, and when the contract was originally negotiated with LeTourneau, that was all set out, the design and manner in which it would be equipped when it left Vicksburg and the manner it would be finally equipped after it reached New Orleans, the final equipment to be placed aboard. It would be extremely costly, but it was never discussed.

Cross-examination.

By Mr. Kohlmeyer:

Q. Did you advise Crescent that you had signed that contract because you knew it was unenforceable?

A. No, I did not advise Crescent. Following the signing of that, I don't believe that I ever had any conversations with Crescent.

Q. Is it customary in the handling of your business that you execute agreements that you know you aren't going to live up to?

[fol. 360] A. It is— Well, I will have to put it another way. Certainly every agreement that is written in our business does not completely hold you liable for the— I'll have to rephrase that. There is always that area in there that allows you some elasticity in drilling contracts, et cetera. Now, as I stated, the whole discussion concerning this, and, understand, I was not in on this portion of it, was that this was what they wanted, that Mr. Tidwell advised me that he had been advised by Mr. Stentz or Mr. Giffin that it was not legally enforceable but if that is what Crescent wanted, that it was perfectly all right to go ahead and sign it; that there were several cases suggested to him where it had already been tried—I don't recall the cases or conditions, but—

Q. Sir, under those conditions, would you not consider it good form, good judgment, good business practice and honesty with your contractors to advise them of that fact?

A. I suppose, in retrospect, I would have to admit to that, yes.

Q. Do I understand your testimony to be that you instructed Mr. Tidwell to sign this agreement on behalf of Dixilyn, knowing or in the belief—which you did not communicate to Crescent nor did anyone else in your or-[fol. 361] ganization—that you were agreeing to something, but you were not going to conform to your agreement? Is that correct?

A. Here again I am going to have to go back to the thinking. At first the Tower's Release Clause was submitted or suggested; Crescent was entirely aware at the

time that we felt that that situation was not acceptable and that the whole area in which we were discussing here was a Tower's Release Clause in a different form.

Q. Now, you said that Crescent was aware of that. How do you know that?

A. I said that was the supposition on my part and the thinking that went into this, first, the receipt of the Tower's Release Clause, and then the letter written around such a condition.

Q. Now, getting back to the question we didn't answer just a moment ago. Do you state here in this courtroom that you deliberately instructed Mr. Tidwell to sign this contract, knowing that you were not going to live up to it and not advising Crescent in advance that you were not going to live up to it?

A. That part of it never entered my mind as to—that here again we were advised it was not legally enforceable; it was one of the things they wanted, and the thought [fol. 362] being here again that they knew it was not, but it was a position they wanted to take.

Q. That doesn't answer my question.

A. All right. I'll say yes. That is the situation under which I gave him the approval to sign that agreement.

Q. Intending not to live up to it.

Mr. Watkins: The law does not require a litigant to live up to an illegal contract.

The Court: Yes, sustain the objection.

Q. Did you consult counsel about this?

A. By "counsel," what do you mean?

Q. An attorney.

A. No, sir.

Q. Did you consult anyone about it yourself?

A. Personally, no, sir.

Q. You were content to take the information that you say Tidwell says he got from Giffin or Stentz? Is that correct?

A. Yes, sir.

Q. Now, going to the other part or parts of this agreement, this letter addressed to Dixilyn by Crescent, being the second letter of December 23, 1957, says that you, Dixilyn, "are authorized to and by this agreement do

[fol. 363] release and relieve us from any liability for account of your underwriters and that any damage claims urged by third parties, as well as any claim which may be urged by virtue of damage to the drilling rig in the course of this towage, shall be for your account and account of your underwriters. It is further understood that the amount of insurance protection which you have in force equals the value of the hull of the barge as to hull insurance, and amounts to four million dollars as to third party claims."

Now, which clause there did you say that Stentz or Giffin said was illegal?

A. Now, as I remember Mr. Tidwell's report to me, it was that they said that no one could sign away their liability, meaning that Crescent could not sign away, under any circumstances, their liability.

Q. Is Dixilyn a contract driller?

A. That is correct.

Q. Do you have contracts with major oil companies?

A. That is correct.

Q. You have executed hundreds of them, haven't you, Mr. Brigham?

A. I wouldn't say during my contracting days I have executed hundreds; I would say perhaps fifty.

Q. Hasn't every one of those contracts had "hold harmless and indemnity" agreements in it?

[fol. 364] A. With majors?

Q. Yes.

A. Yes.

Q. When you sign such a contract, do you intend not to live up to it?

A. No, I don't say that our intentions are not to live up to it.

Mr. Watkins: I'm going to object to that.

The Court: Sustain the objection. I don't think the other contracts are material. You are getting too far afield.

Mr. Watkins: Not maritime, not admiralty law.

Q. Mr. Brigham, I think you were here in court yesterday when we introduced the copies of the insurance policies, were you not?

A. Yes, sir.

Q. Are you familiar with the insurance cover that we have in the courtroom here today, these Crescent Exhibits 7 and 8?

A. No, sir, I'm not. As I testified in my previous period on the stand, that in generalities, generally I am familiar with the fact we have insurance.

Q. If I told you that this insurance covered Crescent's liability in this case, would you know whether or not I was [fol. 365] right or wrong?

Mr. Watkins: We object to that. He is calling for the witness to—

The Court: Yes, sustain the objection.

Mr. Kohlmeyer: If the Court please, on the ruling, I submit I am only asking the witness if he knows whether or not it is covered, and I asked him if I told him that it was covered, would he know whether I was right or wrong. I am not asking him for an interpretation of those policies.

The Court: Yes, I think you are asking him for a question of law. Sustain the objection.

Q. Who negotiates Dixilyn's insurance?

A. Mr. M. O. Boring, Sr., Vice-President and Secretary-Treasurer.

Q. And he would be familiar with the type of insurance you carried and the reasons for carrying it and what the coverage would be, afforded by it?

A. A portion of your question, I'm certain. Now, again, we depend upon our insurance people for the type of insurance we need and how much we need. I doubt very much, not discrediting him any, but I doubt very much he is an expert on insurance.

Q. Do you consult with counsel when you insure?

[fol. 366] A. I have nothing to do with insuring, so I don't know what he does.

Q. I advert now to the Crescent letter of— Strike that. What position did Mr. Stenz and Mr. Giffin take in these negotiations leading up to this contract? I shouldn't say "position." I should say, what was their function in this area?

A. Strictly advisors.

Q. To whom?

A. To Dixilyn concerning the vessel and the conditions under which the agreement, I presume you would say, would be made.

Q. And Dixilyn was completely satisfied to rely on their advice?

A. That is correct.

Q. And you did ask them to advise you?

A. I did not.

Q. Well, your company did?

A. I'm rather certain that is so.

Q. Otherwise, they wouldn't have been at the meeting, would they?

A. May I expound on this? It is kind of like Crescent soliciting our business, that certainly they were soliciting business, and they also had an investment to protect.

Q. Well, they were paid for protecting their investment, [fol. 367] were they not?

A. That is true.

Q. Do you know whether or not Southern Aviation and Marine, which was the company of Giffin and Stentz, had written all of your insurance or only a portion of it? In other words, were they the brokers for the whole placement of the whole risk?

A. At the time I didn't know the relative position of it. Now I know the three coverages we have.

Q. Were they all written through Southern Aviation?

A. No. Brantz and Company in Fort Worth handled the writing of our insurance, the placement of it.

Q. As local agents?

A. Yes.

Q. Did they go through Southern Aviation as to all of it?

A. That I don't know, as I haven't had a copy of an insurance policy in my office on any of this up until this past month.

Q. Now, you say that Mr. Stentz or Mr. Giffin, one or the other, advised Mr. Tidwell and he advised you that this clause was invalid, and therefore you could sign the agreement? Is that correct?

A. Yes.

Q. Do you recognize that it states in there in that agreement that the release is for Dixilyn's account or for account of its underwriters?

[fol. 368] Mr. Watkins: I think it speaks for itself.

The Court: Overrule the objection.

A. Would you repeat it?

Q. The agreement reads: "It is particularly understood and agreed that you, Dixilyn, are authorized to and by this agreement do release and relieve us from any liability for account of your underwriters." Now, was that the clause that you referred to that Tidwell or Stentz said was illegal and to go ahead and sign it?

A. That is my understanding.

Q. How about the rest of the clause: "that any damage claims urged by third parties in the course of the towage shall be for your account and for account of your underwriters."

A. The complete.

Q. In other words, both portions?

A. That is correct.

Q. And it is your understanding that Stentz told Tidwell that both for Dixilyn's account and for the underwriter's account, that clause was invalid and you could go ahead and sign it because it couldn't be enforced?

A. That is correct.

Q. You knew, of course, that Crescent was insisting on [fol. 369] this type of clause to go into the contract?

A. Yes, sir, I knew that there was considerable discussion around there.

Q. And you knew that this was the clause that they said was a condition to the towage at these rates?

A. I don't know that it was expressed exactly that way. Understand, I was not in on the discussion. I was merely receiving this information after the conferences were held.

Q. You don't know if Mr. Tidwell told that to Mr. Stentz or not?

A. I do not.

Q. You weren't present at any conversations with Mr. Tidwell or Mr. Stentz?

A. No, sir.

Q. Or Mr. Giffin?

A. No, sir.

Q. You understood that Crescent's intent in this clause was to shift responsibility from itself to you and your underwriters?

A. Yes, sir. I understood that, and, as I said, that was when the expression was made that they could not sign away their liability under the terms of their insurance and the terms of the Admiralty Law or whatever it was.

Q. And in the event this clause was not illegal, you un- [fol. 370] derstood that it was the intent of Crescent to get this release and to shift the liability over?

A. Well, I understood it was their intent, but during the same time it was my understanding they were as well aware of the situation as we were. That was my understanding. I don't say they were, but it was my understanding they were as aware as we had been advised.

Q. Did they tell you they knew such a clause was invalid?

A. Not to my knowledge.

Q. Where did you get that impression?

A. In the discussions surrounding this with Mr. Tidwell.

Q. This was again Mr. Tidwell's conveying to you what he said Crescent's impression was?

A. As I said, I don't know he specifically said—I said in the discussions concerning the meetings, that was my impression.

Q. Gained from Tidwell; not from Crescent?

A. That is correct.

Q. And in the event that this clause would not be illegal and would be enforceable, you now understand and then did understand that the intention and the effect of the clause was to shift liability from Crescent to Dixilyn?

Mr. Watkins: We object to that as calling for a legal [fol. 371] conclusion.

The Court: Overrule the objection. It is asking about what he understood.

A. I suppose had I dwelled on it, that would have been the conclusion I would have reached, but to my recollection, I don't recall having dwelled on that too seriously.

Q. Did you put any employees on the Julie Ann coming down from LeTourneau's?

A. Did we put any employees on the Julie Ann?

Q. Yes.

A. Yes. I don't know exactly who it was that crewed. Mr. Tidwell handled that phase of it.

Q. Do you know Mr. Hughes?

A. Yes, sir.

Q. Who was he?

A. Mr. Hughes was original — I hired Mr. Hughes, employed him. He was originally set up as project engineer on the construction of the vessel.

Q. You take the position that Crescent was in sole charge of this whole towage?

A. Yes, sir.

Q. Who ordered the tow to start out from Vicksburg?

A. Well, here again that would be— Not knowing until yesterday in the testimony here— I think the testimony [fol. 372] was that Mr. Hughes directed that it be started from Vicksburg.

Q. You saw the picture introduced as Dixilyn's 2, did you not?

A. Are you referring to the two tugs?

Q. Yes.

A. Yes, sir.

Q. And today you know as a fact the barge started out from Vicksburg without Crescent's being there?

A. Yes, I have heard the testimony to that, but I don't know where this picture was taken.

Q. The picture is your picture and not ours.

A. Yes, sir.

Q. And it was offered by your counsel as being taken during the course of the downbound towage.

A. That is correct.

Q. I don't think we want to challenge that, do we?

A. No. I said I don't know what position it was in at this time.

Q. You recognize Crescent wasn't there?

A. I wouldn't recognize that Crescent wasn't there.

Q. You see there is only two boats there?

A. Right.

Mr. Watkins: We object to that.

The Court: Sustain the objection.

[fol. 373] Q. Who ordered the tow to move?

A. When?

Q. When it left LeTourneau's plant.

A. According to the testimony yesterday—

Q. No, sir, not according to the testimony. Do you know?

A. No, sir, I do not.

Q. Who was authorized by Dixilyn to order the tow to move?

A. Well, I don't know that any authorization was ever discussed concerning the movement of the tow. I do know this: I do know that when the arrangements were made and the discussions relative to the tow that the Crescent would have their vessels there and their supervision there and that the tow would be made that morning.

Q. In the event that Crescent wasn't there, did LeTourneau have the power to start the tow down the river?

A. No, sir.

Q. You had no contract with the Toltec or the Ouachita, did you?

A. No, sir.

Q. You didn't even know necessarily that those two vessels would be on the tow?

A. Now, if you're asking for specifics, no, that is correct.

Q. And if the tow moved out of LeTourneau's without Crescent's being there, it must have moved by orders of [fol. 374] Dixilyn?

A. I would assume so.

Q. But you don't know that of your own knowledge?

A. No, sir.

Mr. Kohlmeyer: That is all.

Redirect examination.

By Mr. Watkins:

Q. When did you first learn that neither the Toltec nor the Ouachita were owned by Crescent?

A. I didn't learn that until we were discussing this thing prior to our pre-trial discussions.

Q. Recently?
A. Yes, just recently.

Mr. Watkins: That is all.

(Witness excused.)

[fol. 375] RUSSELL TIDWELL, called as a witness and having been duly sworn, testified as follows:

Direct examination.

By Mr. Watkins:

Q. Please state your name.
A. Russell Tidwell.
Q. And your age.
A. Thirty-three.
Q. Are you employed by Dixilyn Drilling Corporation?
A. Yes, sir.
Q. How long have you been so employed?
A. Four years.
Q. Are you an officer of the corporation?
A. No, sir, I'm not.
Q. Have you had any legal training?
A. No.
Q. Have you had any experience involving the interpretation of contracts?
A. No, sir, none at all.
Q. Mr. Tidwell, tell the Court whether Dixilyn—whether Crescent solicited the business of moving the Julie Ann down the river in December, 1957.
A. Yes, sir, they sure did.
Q. Do you recall Dixilyn's receiving a letter from Crescent dated December 19, 1957, with an attachment thereto [fol. 376] which purported to be an agreement with reference to the taking of the Julie Ann down the river?
A. Yes, sir.
Q. Did you understand the provisions contained in that letter in the attachment?

Mr. Kohlmeyer: I object. Whether Mr. Tidwell understood or not is of no moment, I submit.

The Court: Yes, I'll sustain the objection, but I'll let him answer the question for the benefit of the record.

Q. What is your answer as to whether you understood the provisions of the letter and attachment?

A. Ask me again now. I don't understand the question.

Q. As I understand it, you told me you received a letter dated December 19, 1957, from Crescent which purported to be an agreement with reference to taking the Julie Ann down the river. You received that letter. Now, my question was, did you understand the provisions in the letter and attachment?

A. No, sir, I didn't understand the legal aspects of it and the terminology.

Q. Do you recall receiving from Crescent to Dixilyn a letter dated December 23, 1957, with reference to the taking of the Julie Ann down the river?

[fol. 377] A. Yes, sir.

Q. Did you understand the provisions contained in that letter?

A. No, sir, I sure didn't.

Q. Why did you approve it, Mr. Tidwell?

A. Well, when I received the letter, I didn't understand it, so I had been advised and been discussing the matter with Mr. Giffin and Mr. Stentz, who are with Southern Marine and Aviation Underwriters, so I called them when I received this letter and read it to them on the phone and asked them if it was all right for me to sign it or normal procedure for me to sign it. So they had me to read it again and studied it and talked about it. So there was one sentence in there they said they wouldn't like to sign at all with that sentence in it.

Mr. Kohlmeyer: Does our objection as to hearsay continue on this?

The Court: Yes, sir, and I will overrule the objection to that.

Mr. Kohlmeyer: It will be a continuing objection?

The Court: Yes. You may have a continuing objection to it.

A. They said they wouldn't like for me to sign that letter [fol. 378] at all with that one sentence in it and said, in

fact, all the letter was objectionable, that they wouldn't like for me to sign it at all, but I could go ahead and sign it with that one sentence if it was stricken out, and said even though the rest of the letter— "We don't like it; it's been proven that it's not legal by a prior case in court: that it's not a legal document, but if they insist on you signing it, it will be all right to go ahead but we don't like it, but you can sign the rest of it." So I called Mr. Apgar and told him I couldn't sign it at all with that one sentence in it; that I would sign it if they would strike that sentence out. So he said, "Well, we'll re-write the letter verbatim just leaving out that sentence." And he wanted to know if I would sign it if they would do that. He did; sent me another letter, and I called Mr. Giffin and Stentz and read that letter to them and told them it was exactly the same except that one sentence was left out, and they advised me to go ahead and sign it. That is why I signed it, on their advice, because I felt like I needed some help because I didn't understand it. But I did sign it, not understanding, on their advice.

Q. Was it ever your intent to agree to protect Crescent from the result of Crescent's negligence?

A. No, sir, it was not.

[fol. 379] Q. Was it ever your intent to have Dixilyn's insurance cover Crescent's negligent act?

A. No, sir.

Q. Were you aboard the Julie Ann on the trip down the river from Vicksburg in December of 1957?

A. Yes, sir.

Q. Did you exercise any supervisory control over the navigation of the flotilla?

A Did I— Ask that again, please.

Q. Did you exercise any supervision or control over the navigation of the flotilla?

A. No, sir, I didn't. That's the first time I had ever been on the river. I didn't exercise any—didn't know anything about it.

Q. Do you recall, Mr. Tidwell, when the Julie Ann was turned around with her stern downriver for the final approach to the Natchez Bridge?

A. Yes, sir.

Q. At the time she was turned around for the final approach to the Natchez Bridge, was the Julie Ann brought to a complete stop?

A. No, sir, it never was.

Q. From that point to the bridge, was there any interruption of her movement?

A. Any interruption of her movement?

Q. Was she ever stopped at the point where she was [fol. 380] turned around for a final approach to the bridge?

A. No, sir. No, sir. Never was stopped.

Q. When she was turned around for that final approach to the bridge, had her legs been finally lowered for a passage under the bridge?

A. No, sir.

Q. Did you have any conversation with Captain Brechtel with reference to lowering of the legs after she had been turned around for her final approach to the bridge?

A. Well, Captain Brechtel told me we couldn't lower them until— We had to cross a rock ledge in the river that was a shallow spot and that we couldn't lower the legs until we passed this spot, rock ledge, and then we couldn't lower them to go under the bridge.

Q. How did he happen to tell you that?

A. As we approached, it looked to me like we were getting pretty close and the legs were pretty high, and I asked him, "Why don't we get them down? We're getting pretty close." And he advised me the reason we were waiting was to cross a ledge, and after we crossed it and got the soundings, then we lowered them.

Q. Do you recall when the final lowering of the legs began?

[fol. 381] A. Yes, sir.

Q. I want you to tell the Court whether there was any interruption of the lowering of the legs before she hit the bridge after the final lowering of the legs began.

A. No, sir. Once we started down with them, we never did stop. We started down when we got the word, and we just kept lowering from then on; even after we hit the bridge, we kept lowering.

Q. And you were lowering continually until the time you hit the bridge?

A. That's right.

Q. Where were you as the flotilla approached the bridge?

A. I was on top of the living quarters of the Julie Ann on the barge.

Q. From that position, could you see the three tugs which were face up against the stern of the Julie Ann?

A. Yes, sir.

Q. Could you tell whether their engines were operating?

A. Yes, sir.

Q. How?

A. Well, I could hear them and I could see their stern wash. I could see each one of them had a— They were pushing against us and I could see their stern wash and hear them, and I could see their exhaust smoke.

[fol. 382] Q. What, if anything, did you observe with reference to the Orleans as the flotilla approached the bridge?

A. Well, as we approached the bridge, as I said a while ago, it appeared pretty critical, looked like it was going to be pretty close, and I don't recall exactly what attracted me to the Orleans, but something. I either heard its engine stop or I noticed smoke, or—anyhow, after I looked at it, I noticed that they didn't have any stern wash, that the engine was not running at all.

Q. Was any smoke coming from the stack?

A. No, sir.

Q. What about the other two tugs?

A. They were both still going; the Ouachita and Toltec both were still pushing on it.

Q. As I understand you, there was no evidence of engine movement on the part of the Orleans either from stern wash or smoke or noise?

A. That's right.

Q. What did you do?

A. Well, on the top of the quarters of the Julie Ann, our radio room—where our radio and our controls for lowering the legs and our contact with the tugs, we had the window out of it. You can remove the window. We had a window out so I ran over there and told them to call the [fol. 383] Orleans to get fired up again, that we was ap-

proaching the bridge and it wasn't any time to be shutting the engines down. It was real critical. Looked to me like we was going to hit it, and for them to get back in gear. They told me the Orleans had already advised them that the engine was out of order and they were completely shut down and couldn't run it.

Q. Did that occurrence have any noticeable effect on the movement of the flotilla?

A. Well, there were several people on top of the quarters with me; in fact, quite a few. And I remember specifically commenting myself to someone with me that apparently instead of stopping as we were trying to stop to keep from hitting the bridge, instead of stopping it seemed to me it was accelerating, just gaining speed all the time.

Mr. Watkins: I believe that is all.

Cross-examination.

By Mr. Kohlmeyer:

Q. Mr. Tidwell, what sort of educational background do you have?

A. I have a bachelor of science degree in petroleum engineering.

Q. What school?

[fol. 384] A. Oklahoma. University of Oklahoma.

Q. I recognize you have no legal training. You don't, do you?

A. No, sir.

Q. You signed the letter of December 23rd from Crescent to Dixilyn on authority of Mr. Brigham?

A. Well, I signed it on my authority. I don't recall if I was in contact with Mr. Brigham or not. He was out of town. I don't even recall where he was, and I don't even know if I particularly had his authority or not. I have his authority at any time to sign anything.

Q. When you sign something for Dixilyn, the company adopts your signature and you are authorized to sign?

A. That's right.

Q. And you were authorized to sign this agreement on behalf of the corporation?

A. That's right.

Q. There is no question about that?

A. No.

Q. No one ever told you afterward you had no right to sign it?

A. No.

Q. The company never disclaimed this agreement?

A. No.

Q. And disavowed to it?

[fol. 385] A. No, sir. To my knowledge, not as far as I know.

Q. And if they had, you would have known it, wouldn't you, in your position?

A. I would think so.

Q. Now, after you got this letter, the first of the two letters of December 23rd, isn't it a fact that you advised Mr. Apgar or Mr. Stentz to get in direct contact with each other and to discuss the matter over the phone or personally?

A. I don't recall. It seems to me that maybe I did, or maybe they did get in contact. I don't know if I advised them to or they advised me it would be best. I don't recall. That's been an awful long time ago and I just don't recall.

Q. Are you familiar with insurance?

A. Well, I understand—

Q. —Marine insurance?

A. Marine?

Q. Marine insurance.

A. No, sir.

Q. You don't know anything about the insurance on this rig?

A. I know we have insurance. That's about the extent of it.

Q. Do you know what the coverage of that insurance is?

A. Yes, sir.

[fol. 386] Q. Would it cover a third party towing one of these rigs?

Mr. Watkins: I think that calls for a legal interpretation.

The Court: Sustain the objection.

Q. Now, Mr. Tidwell, you recall the meeting that was held before these letters were written, at your office, where Mr. Boring and Mr. Stentz and Mr. Giffin and Mr. Apgar and Mr. Smith were in your office in New Orleans?

A. No, sir, I don't recall such a meeting with Mr. Boring present. Mr. Boring was not present at that meeting.

Q. You recall no such meeting at all?

A. I recall a meeting where Mr. Giffin and Mr. Stentz and I recall a meeting, but Mr. Boring wasn't present.

Q. Who was there on behalf of Dixilyn?

A. I was.

Q. Who else?

A. No one.

Q. Who was at the meeting other than you, Mr. Apgar, Mr. Smith, Mr. Stentz and Mr. Giffin? Is that the meeting you refer to?

A. That's the one I'm referring to.

[fol. 387] Q. That was the only meeting you had with the Crescent representatives?

A. Well, you know, they come by and visit and—

Q. I'm not talking about a casual meeting; I'm talking about a meeting to effect this contract.

A. Yes, sir, we had a meeting, Mr. Apgar and some other person from Crescent Towing. I don't recall who it was. In fact, when I wrote the notes, I didn't write his name down, but I made the notes of the meeting, and it was Mr. Apgar and myself and some other person from Crescent Towing, Mr. Giffin, Mr. Stentz, and Mr. Charlie Wood and, I believe, Mr. Harry Blakely was there. I would have to check my notes.

Q. Do you have your notes with you?

A. No, sir, I don't.

Q. Are they in Vicksburg?

A. No, sir.

Q. Did you know you were coming up here to testify in this case?

A. Yes, sir.

Q. Are those notes available in New Orleans?

A. Yes, sir. Now, I don't know if they are in Vicksburg or not. I turned them over to the attorneys.

Mr. Kohlmeyer: May I ask if those notes are present [fol. 388] in court?

Mr. Watkins: I don't know if we have those notes or not.

A. I don't have my penciled notes. Now, this was a penciled report I wrote later from my notes.

Q. Those notes were made contemporaneously or immediately following the conference?

A. In fact, during the conference.

Q. And you have the letter you wrote from the notes here in the courtroom, or was that given to your attorneys too?

A. I don't know.

Q. You have it in the courtroom?

A. I don't know. I don't have anything. I don't know if it was—

Q. Did you give it to your attorneys.

A. I'm not sure. I don't know what all they got.

Q. Do you have any contemporaneous memoranda or letters from 1957 relative to this transaction in Vicksburg? I don't mean you. Does it exist in Vicksburg?

A. Well, sir, I don't know what all they brought.

Q. Who brought?

A. —Yes, I have a file.

Q. Where is your file?

A. I say I don't have one. My attorneys have it.

[fol. 389] Q. You gave your file to the attorneys?

A. Yes, sir.

Q. And if that letter is in the file, then it is here in the courtroom? Is that right? If they got the file?

A. If they brought it.

Mr. Kohlmeyer: We call for the production of the correspondence and the notes—

The Court: —You have sufficiently identified the notes. If they have them, I will require them to give them to you.

Mr. Watkins: We are trying to find them.

The Witness: As I said, this was written a year or so later from my notes.

The Court: What letter do you refer to? Do you know what letter you are referring to as having been written from the notes?

The Witness: It wasn't a letter; just a memorandum, inter-company memo.

The Court: In other words, you were not referring to the December 19th or December 23rd letter? That was not written from your notes?

The Witness: No, sir.

Q. Mr. Tidwell, while they are looking for that, we will [fol. 390] go on a little bit further. After you got the letter of December 19th, did you discuss that letter with Mr. Stentz and Mr. Giffin?

A. I don't recall discussing it with them. I just don't recall.

Q. How did Mr. Stentz and Mr. Giffin get in your office?

A. They just sat in on this meeting.

Q. Did you invite them?

A. I think they probably invited themselves.

Q. Did they know the meeting was set up?

A. Yes, sir.

Q. How did they know it?

A. I don't know, but they had to know.

Q. Now, Mr. Tidwell, we are sitting here in court trying to get to the bottom of a situation, and I don't know if it has any bottom. These men didn't just walk into your office casually and go into a meeting and talk about a matter they were interested in.

A. That is why I say they must have known there was a meeting.

Q. And they didn't know it from Crescent?

Mr. Watkins: We are willing to stipulate they did not get any information about the meeting or the contract from [fol. 391] Crescent. Any information they got came from Dixilyn.

Q. Did you invite them to the meeting?

A. I don't recall. In fact, I think they called the meeting, being I got to thinking about it. I think they called for the meeting.

Q. Did they act as advisors to Dixilyn as regards the making of this contract? I'm speaking of Stentz and Giffin.

A. Well, in respect to the letter I signed, they advised me on that.

Q. Had you had the letter yet?

A. No, sir.

Q. What were they doing at the meeting? Isn't it a fact Mr. Stentz, Mr. Giffin and Mr. Wood and Mr. Blakely were there as advisors to Dixilyn for the purpose of advising Dixilyn about the handling of the towage of the Julie Ann from Vicksburg to New Orleans? Isn't that a fact?

A. Here's what I knew about it. I don't know what you are getting around to—

Q. Never mind what I'm getting around to. Just answer the question.

A. They asked for a meeting.

Q. Who?

A. Mr. Charlie Wood specifically asked for the meeting.

[fol. 392] Q. Whom did he ask?

A. Asked me, I suppose. I don't recall. That's two and a half years ago.

Q. How do you recall he asked for the meeting?

A. Because I didn't know enough about it to call a meeting.

Q. Did he ask you to hold a meeting?

A. Someone asked for a meeting, and I don't recall who did, but I think it was Mr. Wood asked for a meeting to discuss the rigs that would be used and who would be master of the tow, that he wanted to know.

Q. Why would he want to know?

A. To be perfectly frank, I don't know. He's an accident or loss prevention marine surveyor.

Q. Was he on Dixilyn's payroll?

A. No, sir.

Q. Did you know he was representing your underwriters?

A. At the time I didn't know who he represented.

Q. Now, Mr. Tidwell, really, do you sit up there and tell us some stranger called you to ask for intimate details of your business and how you were handling it, and you called a meeting and disclosed all that without knowing who he is?

A. Yes, sir.

Q. That is true?

A. For this reason: I had very recently—in fact, in [fol. 393] October, I was transferred from West Texas to New Orleans as district manager. I had never had any

marine experience whatsoever. I didn't know the first thing about making a towing contract. I never had even seen a towboat except at a distance. I didn't know the first detail; didn't even know who had our insurance, but I did know that Mr. Wood and Mr. Blakely, the Charlie Wood Company, had been interested in the Julie Ann during construction and had been going to Vicksburg and checking it out, and that they were marine surveyors and—not even knowing what a marine surveyor was—but if they asked me for a meeting, I would have been most happy to call it, which I did, and I didn't know their connection whatsoever with my company. I certainly did that.

Q. You know nothing about operating a drilling rig?

A. I know a lot about operating a drilling rig.

Q. Excuse me. A submersible rig such as the Julie Ann. The operation of it, navigation, and the machinery on it, as of this time you didn't know anything about, did you? I don't mean drilling. I know you knew how to drill.

A. I knew the legs went up and down, but at that time I knew nothing of the operation.

Q. You didn't know how to operate those legs up and down?

[fol. 394] A. Well, yes, I did. I knew you pushed three buttons, but that's all.

Q. You didn't know how they activated the descent?

A. No, I hadn't ever seen a rig but one time while it was under construction. It was out of my area.

Q. Isn't it a fact you had Wood and Blakely and Stentz and Giffin in these meetings with Crescent relative to this contract and in these discussions relative to the contract as technical advisors to Dixilyn?

A. Well, sir, as I said, I didn't know at the time what their position was, and I didn't know what my position was relative to them. I didn't really know. I accepted some of their advice, so I suppose I could say I had them as advisors.

Q. You did rely on their advice, didn't you?

A. Yes, sir.

Q. Fine. Now, when you got this letter of the 19th, you called Stentz? Correct?

A. Giffin or Stentz.

Q. Giffin or Stentz?

A. Yes, sir.

Q. And you discussed the letter?

A. No, not the 19th.

Q. What did you do when you got the letter of the 19th?

A. I didn't do anything.

Q. Why, if you know, was the letter of the 23rd written?

[fol. 395] A. I don't know why it was written.

Q. You never asked for an additional letter, for a change in the contract that was submitted, the clause that was submitted?

A. I don't understand what you mean. I don't believe I asked. I may have. I don't recall, but I may have asked on someone's advice, but I don't recall.

Q. If you did ask, then you asked on either the advice of Stentz or Giffin? Correct?

A. Correct.

Q. Then you got the first of the two letters of the 23rd?

A. Yes, sir.

Q. And you talked to Stentz about the letter and read it to him a couple of times?

A. Giffin or Stentz.

Q. And either you got directly in touch with Apgar or Apgar got in touch with Stentz after you talked to him, or Stentz called him. In any event, the substitute letter was written. Is that correct?

A. Correct. I don't recall who got in contact with who, but I did get a substitute letter.

Q. State what your conversation was with Stentz or Giffin after you received the first of the December 23rd letters.

A. Would you repeat that?

Q. What was your conversation, if any, between you and [fol. 396] Stentz or Giffin after you got the first of the December 23rd letters?

A. Well, I called them and read it to them on the phone a couple of times.

Q. Correct.

A. And they told me—I don't recall the particular words, but they said, "Read back a certain sentence." And I read it back and they said, "We don't like that sentence at all. I just wouldn't like for you to sign it at all with

that in there." And said, "The rest of it is what is called or is a take-off or similar to a tower's release clause, which has been proven in court as illegal, and we don't like it; it's objectionable; but if they insist on you signing it, we would advise you it would be all right for you to go ahead and sign it because it could not be binding."

Q. They told you it was not binding?

A. That it was not legal.

Q. Not legal?

A. It had been proven in court that it was not.

Q. They didn't tell you anything about the first clause they felt objectionable?

A. They didn't tell me why.

Q. They didn't tell you that was illegal?

A. Didn't tell me why it was objectionable.

[fol. 397] Q. But you did sign the second letter with the clause eliminated that they objected to?

A. Yes, sir.

Q. And when you did that, you were authorized by Dixilyn so to do?

A. Yes, sir.

Q. Now, Mr. Tidwell, I ask you to refer then to this letter which reads, "It is particularly understood and agreed that you are authorized to and by this agreement do release and relieve us from any liabil y for account of your underwriters . . . " That is the letter you signed. Were you authorized by your underwriters to sign that letter?

A. I don't recall what that letter said.

Q. You sent it, didn't you?

A. Yes, sir.

Q. Well, suppose you look at the letter, and then possibly you can answer my question. The second paragraph, just the first three lines. (Hands to witness.)

A. Now then, ask me the question again.

Q. That says, does it not, that Dixilyn was authorized to release and relieve Crescent for account of the underwriters from any liability on this towage movement? Does it not?

A. "From any liability for account of your underwriters and that any damage claims urged by third parties as [fol. 398] well as any claim which may be urged by virtue

of damage to the drilling rig in the course of the towage shall be for your account and account of your underwriters." That's what it says.

Q. And it says you were authorized to do that for account of your underwriters, doesn't it?

A. Authorized to do this "for account of your underwriters."

Q. It says that?

A. Yes, sir.

Q. Were you authorized?

A. I think so.

Q. You can't just tell me you think so.

A. Well, if you don't know, you have to.

Q. Were you authorized to do it?

A. I thought so.

Q. Why did you think so?

A. Because Mr. Giffin and Mr. Stentz advised me it would be all right to sign it.

Q. Well, then, the answer is yes, isn't it? They authorized you to sign this letter and authorized you to say what you said in the letter? That is correct, isn't it?

A. Yes, sir.

Q. So you had authority both from the underwriters and Dixilyn, didn't you, to sign the letter?

Mr. Watkins: He is talking about authority from Giffin [fol. 399] and Stentz. That is Southern Marine and Aviation and not any other underwriters involved in the case. I think he ought to limit the question to one instead of referring to underwriters generally.

Mr. Kohlmeyer: That's the only underwriters we know of at this time.

Mr. Watkins: Counsel, you introduced the insurance policies.

The Court: You say "at this time." Back in 1957. I think I will sustain the objection to that for this reason: You are asking questions of law. Sometimes whether a fellow is authorized or not is a close question of law. You brought out the facts as to whom he had the conversations with, so if he was authorized under those facts, yes; if he was not, then he wasn't. So I will sustain the objection

on that ground which I raise myself. You brought out all the facts yourself and who the folks are.

Mr. Kohlmeyer continues:

Q. You knew, of course, Giffin and Stentz were the two bosses at Southern Aviation and Marine?

A. I understood one of them was, and the other vice-president.

[fol. 400] Q. Now, moving on, that letter says and you knew that it said that Crescent was not responsible for damages to third parties in the course of the towage. You understood that from the letter or from the words of the letter?

A. Well, it appeared as such, yes.

Q. And the reason that you were willing to go along, I believe you said, was because they told you that was illegal? Is that right?

A. Well, I may have used that term "illegal" wrong there in legal terminology. They told me it was not a binding document.

The Court: Mr. Kohlmeyer, I think you have fully covered that phase of it many times. I don't want to cut you short and if you are leading up to something else, go ahead, but he has answered that several times.

Mr. Kohlmeyer: Yes, sir.

Q. Was the insurance of Dixilyn on this barge disclosed to Crescent as being placed with three different companies or groups of underwriters?

A. Yes, sir.

Q. When?

A. At that meeting.

Q. Which meeting?

[fol. 401] A. The meeting when Mr. Apgar and one other person from Crescent and Mr. Giffin and Mr. Stentz and Mr. Charlie Wood and Mr. Harry Blakely.

Q. That was disclosed?

A. Yes, sir.

Q. Was the type of cover disclosed?

A. I don't think so. The reason I say it was disclosed, can I go ahead and tell you why?

Q. Sure.

A. Because I called Fort Worth. I called Texas Employers' Insurance Company at Midland and at Fort Worth and Employers' Casualty at New Orleans, with everyone present. I made these calls and I talked to Mr. Brantz at Fort Worth and advised everybody that we had twenty-five thousand dollars coverage by Employers' Casualty and a million dollars by somebody else. Anyhow, I told them —Swett and Crawford—and we acquired three million dollars additional through Southern Marine and Aviation, and it all went right on in the meeting, all the phone calls, with everyone present.

Q. Who was in charge of the movement of the rig from Vicksburg to New Orleans, as far as Dixilyn was concerned?

A. Well, technigally, I was. I was the superior.

Q. Who gave the order to move the rig from Vicksburg? [fol. 402] A. Well, I don't know that anyone gave the order. I suppose I did or my company did. We received it, and I don't know that we gave any specific orders. We just moved it.

Q. Crescent wasn't there when it started, was it?

Mr. Watkins: We object to that. It's a conclusion. There were two tugs of Crescent present.

The Court: Sustain the objection to his conclusion. I'll let you ask him to provide names.

Q. Was there any representative of Crescent Towing and Salvage present at the time that the rig left LeTourneau yards in Vicksburg?

A. Well, I don't know any names. They had a tug.

Q. What tug?

A. I don't know whether it was or not.

Q. The tug didn't meet the rig until you were out in the middle of the river some distance from LeTourneau, did it?

A. That's right.

Q. Who was in charge of the movement, the navigation of the flotilla down the river from Vicksburg prior to the time the tug Orleans met you?

A. I don't recall the gentleman's name. It was a pilot from the tug Ouachita. I say "pilot." I assume he was a

[fol. 403] pilot. Anyhow, he was a river pilot or river captain that came aboard the Julie Ann as master of the tow or pilot of the tow. I don't know what you call him.

Q. And someone from your organization said, "Let's go," and so you left? Is that right?

A. That's right.

Q. Who made the tow ready for departure by putting the steel bar across the keyway?

A. LeTourneau did that during construction; it's been there all the time.

Q. On whose orders? Do you know?

A. No, I don't. It was just part of the contract to build the rig to build the towing bar in it. It was already in there, already installed beforehand. Part of the construction, I mean.

Q. When the flotilla left there was no untoward incident until the following day? In other words, it was a routine voyage down to Rifle Point and the tying up for the night, wasn't it?

A. I don't recall any—

Q. Well, let's drop that and get to the next day then. When you were approaching the bridge where the accident occurred, was anyone standing at the legs reading the draft marks?

A. Yes, sir.

[fol. 404] Q. Who?

A. Employees of Dixilyn, people that I had stationed there.

Q. Did you hear them calling the draft marks off?

A. Yes, sir.

Q. Did they call fifty-five feet on all three legs?

A. No, sir. I don't recall what the specific drafts were, but two of them called one thing and another one called another thing.

Q. What did the two call?

A. I don't recall.

Q. Did they call the same thing?

A. Very close. I don't recall how much.

Q. Isn't it a fact the draft marks were misread at one time during this period?

A. Yes, sir.

Q. When was that?

A. Just before we got to the bridge.

Q. How far away from the bridge?

A. I wouldn't have any idea. Pretty close.

Q. Very close, wasn't it?

A. Pretty close, yes, sir.

Q. You don't know how far?

A. No. It would just be a guess.

Q. Isn't it a fact that someone read the draft mark on the starboard leg as being fifty-five feet and then discovered that it was only forty-five feet?

[fol. 405] A. Oh, no, sir.

Q. That is not true?

A. No, sir.

Q. What is the fact?

A. Well, the fact is, you see, we have these draft marks on the legs and I had them to read the draft mark so I could calculate how much was up in the air, knowing the distance from the water to the bridge, so I could know when we had enough.

Q. What distance was that?

A. I don't recall.

Q. Go ahead.

A. So the mistake was not made on the starboard leg; it was made on the bow leg, which was upriver, the last one to get to the bridge.

Q. That is the helicopter platform?

A. The helicopter platform. So they were calling the stern legs as a certain draft, and I merely transported it to so much in the air. I made it around one leg to the other to kind of keep track. When I got to the bow leg, he called out a draft, and if his draft would have been correct, the bow leg would have been ten feet higher than it actually was. We thought it was sticking up ten feet higher than it actually was, and the starboard and port leg, they were correct on those, to the best of my knowledge.

[fol. 406] Q. What was the draft? Do you know?

A. I don't recall. I sure don't.

Q. But the leg that was too high didn't hit the bridge?

A. No. As it turned out, the boy had made a mistake, and it was ten feet lower than the draft he gave. So it didn't hit the bridge.

Q. So the mistake was in favor of the bridge?

A. That's correct. If he had been correct, ten feet of the bow leg would have hit.

Q. You understand this is a very important point in this case, don't you?

A. Yes, sir.

Q. And you are quite positive of what you have just said, that no mistake was made on the port or starboard legs, but only on the helicopter platform leg? You are positive of that?

A. Well, now, when I say no mistake was made, I never was conscious of any mistake. I'm positive I always felt sure—In fact, I felt sure they were all right until the time, but I never did know of any mistake at all on the starboard and port legs. No, sir, I sure didn't.

Q. And you don't know what depths those legs were supposed to be lowered to?

A. Well, at the time I did, but I don't recall.

Q. And you don't know what clearance you planned to [fol. 407] pass under the bridge on?

A. I believe we planned to have it ten feet below the bridge.

Q. Ten feet below the bridge?

A. That's an awful long time ago, but I believe we did plan to get it ten feet below the bridge.

Q. Didn't you know you were going to testify in this case?

A. Yes, sir.

Q. Haven't you discussed this matter with your counsel over the past day or two?

A. Yes, sir.

Q. And you still don't recall and haven't gotten your recollection refreshed about the footage?

A. Sir, I can't recall. If I can't recall, I just can't. I didn't make any notes of it, and I didn't attempt to recall it.

Q. Suppose I told you that Mr. Hughes would testify that it was the starboard leg that was misread, and it was misread against the rig and in favor of collision. Would that refresh your recollection?

Mr. Watkins: We object to that. There is no such testimony from Mr. Hughes, and, second, even if it were in, Mr.

Hughes' testimony could not be confronted to this witness in an effort to change his testimony.

[fol. 408] Mr. Kohlmeyer: I'm not trying to change it; I'm just trying to refresh his recollection. He says he doesn't know.

The Court: I'll sustain the objection for the reason that there is nothing here on which to base the hypothetical question.

The Witness: May I say something?

Mr. Watkins: The Court has sustained the objection.

Mr. Kohlmeyer: Your counsel doesn't want you to say anything.

A. I'll just answer that question in this way: that Mr. Hughes was inside the building operating the legs, and I was the one on the outside of the building taking the readings, and I'll say he was mistaken because I was out there and saw it and did it myself. So if he says one thing and I say another, I would be the one doing it. So that's what I would say if he testified to that.

Q. You were running around the rig from one leg to the other?

A. No, sir, on top of the quarters and calling to men on the legs.

Q. And they would call to you?

A. They would call to me.

[fol. 409] Q. And you would pass the information to Mr. Hughes?

A. Ever so often I'd go in there and say, "We still got so much on stern and so much on—"

Q. And the rig never came to a rest from the time you left Rifle Point until you hit the bridge?

A. Well, after we made our final approach. I don't recall up the river. I don't know where Rifle Point is.

Q. That is where you stayed for the night.

A. When we made our approach to the bridge, it never came to a halt. We tried to. We attempted to.

Q. I don't know what you mean by your approach to the bridge. When did that start? A mile upstream? Two miles? Two hundred yards? What do you mean by your final approach?

A. When we turned the rig around and started backing up to the rig.

Q. From the moment you turned the rig around until the time you struck the bridge, the rig never stopped?

A. Well, we turned it around several times. We turned it around going under the power line the day before. We did turn it around once.

Q. I'm not talking about the day before. I'm trying to talk about your approach to the bridge.

A. I'm trying to refresh my memory. We did stop and turn around with the legs up one time. In fact, we were making a trial to see if they could stop it, and they did stop [fol. 410] it with one towing, the Toltec.

Q. With the legs up?

A. The cans were up.

Q. When you say "cans" what do you mean?

A. The bottom.

Q. All the way?

A. They might have been down some.

Q. When was this?

A. I don't recall.

Q. The morning of the collision?

A. That's what I was mentioning the day before. I don't recall if we did that the day before or—

Q. Is it your testimony that your final approach started its movement downriver from the time you made the final approach to the bridge until it—

A. —No, sir. We tried awful hard to, but we couldn't.

Q. You didn't stop?

A. No, sir.

Q. Is it your testimony that your final aXpproach started at the time the rig was turned around, headed upstream, and then allowed to float down? Is that the final approach you refer to as the last time?

A. Well, I think so, yes, sir. To the best of my memory. That morning we may have gone all the way turned around. I don't recall.

Q. Where were you standing on the rig, did you say?

[fol. 411] A. On top of the quarters, living quarters.

Q. Point here to the top of the living quarters for me.

A. All on top of this building right here. (Indicating.)

The Court: At this time we'll take a ten minute recess.

(Whereupon the hearing was recessed for ten minutes.)

After Recess

Mr. Kohlmeyer continues:

Q. Mr. Tidwell, will you please put on Dixilyn's Exhibit 2 an "X" on the area on which you were standing at the time you have just described?

A. Well, I moved around. I went all over the top of these quarters.

Q. I understand.

A. It can't be just a simple "X".

Q. I understand, but I want the area.

A. All this area here. (Indicating and marking.)

Q. You have shaded the area you mean. And on this color transparency, which is not in the record, it is the area on top of the house marked with the word "Dixilyn." Is that correct?

A. That's correct.

[fol. 412] Q. Now, from that position you were able to see all of the towing vessels?

A. Yes, sir.

Q. The whole of them?

A. Well, of course, there were obstructions between. There are braces. You may not stand in one spot, but you can look around and see.

Q. What kind of smoke did you see coming out of the stacks of the towing vessels?

A. I don't recall.

Q. Was it black, white, or what?

A. I don't recall. I suppose you are referring to a while ago when I said probably smoke I just noticed. You can tell if they are running.

Q. I thought you said you saw smoke coming out?

A. I said that could have attracted me to it. I don't recall what attracted me to the tug, but something attracted me to it and I checked it, and it may have been the smoke or sound or I noticed that there wasn't any propeller wash. I don't know what it was, but something attracted me to the tug, made me take notice of it.

Q. Now, you recall when the barge turned around and headed upstream on this occasion just before going through the bridge? You recall that, of course?

A. Yes, sir.

[fol. 413] Q. What was the position of the legs when the turn was made?

A. They were down some. You know, they told us we had to go down, we had so much draft, and I don't recall how much. The cans were still—they were left about twenty to thirty feet, or something like that. I don't recall, but they weren't up as far as they would go, but not down very far.

Q. In other words, you had a depth of twenty to thirty feet on your legs at the time the barge turned around?

A. Well, that's just a guess. I don't know how much it was, but they were down some from the upper legs.

Q. What is the rate of decline if you are depressing?

A. Well, the manufacture rating is a foot a minute, but I checked it, I guess—oh, numerous times I checked it, and it always checks out the legs move eight feet in five minutes.

Q. Eight feet in five minutes?

A. Yes, sir.

Q. Can they all move at the same time?

A. Yes, sir.

Q. If you hook the generators up in parallel or series, does it make any difference?

A. I don't think we can hook them up in series. They are parallel.

[fol. 414] Q. And all three legs operate at the same time?

A. Yes, sir.

Q. To full efficiency?

A. They can either one at a time or all of them.

Q. With full efficiency if all of them are on?

A. Yes, sir.

Q. How long was it from the time that you turned—or that the rig turned around until the collision, in minutes?

A. I don't have the slightest idea.

Q. You don't know whether it was an hour or fifteen minutes?

A. No, sir, I don't. I sure don't recall.

Q. When you were calling the drafts to Mr. Hughes—Is that correct?

A. Yes, sir.

Q. —Up on that area that you have shaded on Dixilyn's Exhibit 2, there were with you Captain Brechtel and Mr. Wood, were there not?

A. I think they were in and out. I think the majority of the time, I believe, Mr. Wood stayed inside the control room, and I think Captain Brechtel—I don't recall—I believe he was in at the radio. I'm not sure where he was. I believe he was in at the radio.

Q. Who else was in that area with you at that time you [fol. 415] were approaching the bridge? Anyone?

A. Yes, sir.

Q. Who?

A. We had LeTourneau people.

Q. Can you mention any names?

A. No, I don't know any of them, don't recall any of the LeTourneau people at all.

Q. And you don't recall Wood or Brechtel being up there with you the entire time?

A. They may very well have been. I don't recall. I remember one time—I know one time in particular Woods was inside the radio, and I don't recall if anybody else was up there all the time or part of the time. People were coming and going.

Q. Did you call the drafts or did you call the heights over the surface of the water when you were calling to Hughes?

A. I called the height above the surface of the water.

Q. What were those ranges? Do you recall that?

A. No, sir, I sure don't.

Q. How long were the legs?

A. The legs were 143 feet in height.

Q. And you don't remember a single call that you made?

A. No, sir. As I said a while ago, I don't recall the—Of course, I don't recall how many or how much distance was between the water and the bridge, so I just don't [fol. 416] recall.

Q. Well, in letting the legs down, Hughes was relying on your calls? Is that right?

A. Well, I was going to tell him when to stop, yes, sir.

Q. And you don't remember now when you were going to tell him to stop?

A. No, sir. I don't know what draft reading I would tell him to stop. I don't recall.

Q. Would Hughes know that, do you know?

A. He may very well. I don't know if he does or not. I haven't talked to Mr. Hughes at all in a couple of years, so I don't know if he'll recall or not.

Q. Were you present at any time where a discussion took place with Mr. Hughes and/or Mr. Wood and/or Captain Brechtel when it was agreed as to what you would let the legs down to in transiting the bridge?

A. I'm sure I must have been or I wouldn't know when to tell him to stop.

Q. But there was an agreement as to what the draft would be?

A. Yes, sir.

Q. And you don't remember that was fifty-five feet?

A. No, sir, I sure don't. I don't recall what it was.

Q. There was an agreement?

A. There was.—There had to be for me to know, when [fol. 417] to tell him to stop. I don't recall the agreement or—but there had to be one or I wouldn't know when to tell him to stop.

Q. And you never told him to stop on any of the legs?

A. No.

Q. You were still letting them down and had been the entire time from the time you had turned the rig around until the time of the collision?

A. No. We didn't start letting them down until we crossed this rock ledge we were waiting to cross when we started letting them down. We didn't let them down when we first turned around.

Q. Did you give the orders to start?

A. No, sir.

Q. Who gave the orders to start?

A. Brechtel, I believe would be—I don't recall, but Brechtel, he was taking the soundings of the river and so forth.

Q. How was he doing that?

A. There was some boat taking soundings or some boat that had met us there and was taking soundings and relaying them to him.

Q. To Brechtel?

A. I think to Brechtel, yes, sir. I don't recall. I suppose he was the pilot. They weren't relaying them to me.

[fol. 418] Q. I show you here Crescent's Exhibit 1 and ask if you can tell me on that map where the point was when the legs first were started down.

A. No, sir, I couldn't tell you at all. I don't have any idea. I don't even know how to read this.

Q. It is a hydrographic chart of the river in the Natchez area, the bridge being here, as you can see from the marking there, (indicating) and this is downstream.

A. Is this the bank? (Indicating.)

Q. That is the Louisiana shore, and this is the Mississippi shore, and this is the river and those are the draft marks on the hydrographic chart.

A. No, sir, I wouldn't know.

Q. Is there any location on the shore that you can place? Do you recall whether there was a cable crossing, a Learned's Mill, an old ferry landing, or any land mark you can give me that would tell me where you started letting the legs down?

A. No. I remember a ferry landing being pointed out to me, talking about that's where it used to be, but I don't know if we were turning around or turned around or getting ready to turn around. I can't recall any land mark at all.

* * * * * * *

[fol. 585]

IN UNITED STATES DISTRICT COURT

OPINION OF THE COURT—Filed December 13, 1960

The Libellants, on December 22, 1958, filed their libel in the District Court, seeking to recover damages in the amount of $41,363.24, which they had sustained when their bridge across the Mississippi River, located between Natchez and Vidalia had been struck by the off-shore drilling barge, Julie Ann. The accident occurred December 27, 1957. Libellants averred that the Defendants, Dixilyn

Drilling Corporation and Crescent Towing & Salvage Company, Inc., were guilty of negligence that proximately caused the damages to the bridge. In March, 1959 Dixilyn Drilling Corporation, hereinafter referred to as Dixilyn, filed its answer denying negligence on its part, but admitted it had employees on board the rig who were in charge of raising and lowering the legs that will hereinafter be more particularly described, but denied the failure to lower the legs was any negligence on the part of Dixilyn. It averred that the fault was all on Crescent and that Crescent did not have sufficient power to stop movement of the off-shore drilling rig when it became apparent that the same could not pass under the bridge without one of its vertical legs colliding with the bridge, and further averred that Crescent failed to give the signal it should have given in time to lower the legs. In March, 1959 Crescent filed its answer and denied any negligence on its [fol. 586] part and averred that the collision was due to the negligence of Dixilyn; averred that the rig was fully manned and controlled by a crew of specialists during the trip down the river; averred that Crescent did not have dominion or control over the maneuvering of the barge or the legs thereof and that the fault was entirely due to the crew of the Dixilyn. At the same time Crescent filed a petition under Rule 56 of Admiralty. This petition was based on the contract between the parties for the performance of the service of towage. It attached thereto as exhibits two letters, one dated December 19 and one dated December 23, 1957, which it alleged constituted the agreement. The petition further alleged that under the terms of the contract Dixilyn had agreed (1) to indemnify Crescent for all damages which might arise out of the movement, including claims of third parties; and (2) to procure full insurance protection at its own expense against all risks, including damage to any bridge or structure, and such insurance to inure to the benefit of Crescent as well. Dixilyn answered the petition and denied that it had agreed to the indemnity provisions of the contract or to the provisions relative to the insurance, and denied that the Dixilyn crew had anything to do with the movement of the legs other than to raise or lower them as directed by the em-

ployees of Crescent; denied that its crew was in charge of the timing and mechanics of raising and lowering the [fol. 587] legs or that there was any error on its part in reading or reporting the draft marks of the legs; and denied the interpretation that was placed on the contract by Crescent. On April 21, 1959 Libellants answered the petition under Rule 56 of Admiralty and averred that one or both of the Defendants were liable. After several pretrials the Defendants stipulated that the Libellants were entitled to a judgment for the damages to the bridge against either one or both of the Defendants. In March of 1960 the case came on for trial on its merits with reference to the contest between the Defendants as to which one was liable.

The controversy grew out of a contract between Crescent and Dixilyn under the terms of which Crescent contracted to tow down the Mississippi River from Vicksburg to New Orleans, Louisiana a large off-shore drilling barge or rig named the JULIE ANN. It left Vicksburg, Mississippi on December 26, 1957 and as it undertook to pass under the bridge which crosses the Mississippi River at Natchez one of the legs on the rig had not been sufficiently lowered to pass under the bridge and it struck the bridge, doing damage to the amount of $41,363.24. This rig was gigantic in structure. She was 194 feet long, 152 feet wide and 20 feet deep, triangular in shape, with one movable leg at the bow and two at the stern. The legs were 175 feet long, with open truss steel frame construction. The lower ends contained pontoons or spud tanks 35 feet in [fol. 588] diameter and 35 feet in overall height. The legs provided a tripod on which the platform could be raised or lowered at the rate of approximately one foot per minute. The draft of the hull was 13 feet. Beyond the main deck was a machinery deck containing a complex lot of equipment and tanks necessary for power service and oil well drilling operations. On the main deck were located draw works, pipe racks, two revolving deck cranes, three anchor wenches and 2-story living quarters, atop which was a control tower. The rig was a complete unit. The living quarters were spacious, affording accommodations for 45 men, with year-round temperature control.

The Defendant Crescent is a towing company, engaged in harbor, off-shore and ocean towing and tug work, and sometime in November of 1957 Crescent sought the business of towing the rig down the Mississippi River ultimately to its off-shore location. This solicitation was in the form of a letter dated December 18, 1957 from E. J. Pic, Jr., operating manager of Crescent, to Mr. Pickering of Dixilyn. Sometime between December 16 and 18, 1957 a meeting was held in the New Orleans office of Dixilyn, at which meeting there were present: M. O. Boring, Jr., President of Dixilyn; Russell Tidwell, a petroleum engineer for Dixilyn; Charles D. Wood of Charles D. Wood Company, a marine surveyor representing Southern Marine and Aviation Underwriters Insurance, one of the excess coverage [fol. 589] carriers for Dixilyn; H. W. Blakely of Charles D. Wood Company, a marine surveyor of Southern Marine and Aviation Underwriters, Inc.; Warren C. Apgar, Vice President of Crescent; and William S. Smith, Jr., also a Vice President of Crescent. The problem of transporting the JULIE ANN from Vicksburg to New Orleans was discussed, and particularly the size of the rig, the length of the legs, the current, and the size and number of the tow boats that were to be used in the towage of the rig downstream. After various discussions it was found that John J. *Bechtel*, a Crescent employee and experienced river man and tugboat operator, engaged by Crescent and regularly employed by them, could be furnished, and Crescent agreed to place Captain John J. *Bechtel* in charge on its behalf before undertaking to tow the rig to its point of destination; that he would be in command of the tug and all tows, and it was further agreed that Dixilyn would have an experienced man on the rig who would be in charge of lowering the legs of the rig when he was notified by Captain *Bechtel* that the legs should be lowered. At this meeting it was discussed as to the length of the legs that should be left off in order to reduce the force of the current on the rig and in the discussion the length of 60 feet was considered, but finally Mr. Brigham, who represented Dixilyn, advised that 30 feet already had been left off the legs and ultimately Crescent agreed that 30 feet left [fol. 590] off would be sufficient. Apgar, representing Cres-

cent, suggested that Crescent would require a clause in the towing agreement releasing Crescent from any and all liability in connection with the movement. Nothing definite was agreed on at this discussion, other than that Crescent would undertake the towage and would place in charge of it Captain *Bechtel*. The question of a clause in the towage agreement releasing Crescent of all liability was not determined at this meeting, but finally was agreed upon by correspondence after some negotiation and elimination of oral demands that were made by Crescent and the agreement ultimately was reduced to writing, as is shown by letters hereinafter to be referred to.

After that meeting another one was held on December 18 and 20, 1957 in the offices of Dixilyn, where representatives of each party were present, as well as representatives of Southern Marine & Aviation Underwriters. However, these representatives of the Underwriters were there simply as consultants and had no authority to bind anyone, and at this meeting the nature of the release clause was discussed, but no definite agreement reached. Griffin and Stentz requested Apgar to submit the type of release clause desired by Crescent and on December 19 Apgar wrote Dixilyn, to which was attached the standard towage release clause used by Crescent. Dixilyn declined to execute that and requested Apgar to submit another [fol. 591] type. Brigham, who represented Dixilyn, was not present when it arrived, so Tidwell, an authorized representative of Dixilyn, received it and upon its receipt called Griffin and Stentz of Southern Marine for their comments, and after talking to them declined to accept it, but asked that Apgar submit another clause for their approval. On December 23, 1957 Apgar wrote a letter setting out what they desired and this was received by Tidwell, who did not understand the full meaning of the letter and so again he called Giffin and Stentz and was advised by Giffin and Stentz that the letter was objectionable because the first sentence of the second paragraph was illegal and unenforceable. Tidwell then relayed this information to Apgar, who then called Giffen and Stentz to determine what he could further agree to. Giffen and Stentz told him

they could not agree to that, but for them to submit another letter excluding the objectionable sentence and they would instruct Tidwell to sign it. Apgar then sent a third letter, dated also December 23, and upon its receipt by Tidwell he called Giffen and Stentz for advice. Giffen told him to sign the letter in that form, but that it was illegal and unenforceable, so his signing it would make no difference, and thereupon the second letter of December 23 was signed by Tidwell and copy returned to Crescent. Tidwell then went to Vicksburg to join the JULIE ANN. The important part of the second letter of December 23, [fol. 592] 1957 reads as follows:

"It is particularly understood and agreed that you are authorized to and by this agreement do release and relieve us from any liabilities for account of your underwriters and that any damage claims urged by third parties as well as any claim which may be urged by virtue of damage to the drilling rig in the course of the towage shall be for your account and account of your underwriters."

The first letter of December 23, 1957 contained this language:

"You agree to indemnify us, our tugs and equipment and all other parties taking part in the towage and their equipment and our and their underwriters of and from any and all liability or claims which may arise out of the towage of the drilling barge."

This sentence was eliminated and does not constitute a part of the written agreement.

Crescent contends, among other things, that Dixilyn is estopped to deny liability under that agreement because Dixilyn knew that that part of the agreement was void and unenforceable. This contention of estoppel cannot be accepted because Dixilyn did nothing to mislead Crescent. The parties were dealing with each other at arms length and had received advice from their attorneys. The doctrine of estoppel therefore does not apply.

[fol. 593] On December 24 Crescent's tug ORLEANS left the city of New Orleans for Vicksburg with Captain Shirer as pilot and Walter Puckett as relief pilot, Robert

Ricord as engineer, a Mr. Gonzales as relief engineer, and an oiler. Fog delayed their arrival in Vicksburg for the appointed time for departure of the rig. About midnight of Christmas Day the 4,000 h.p. triple screw TOLTEC arrived at the LeTourneau plant in Vicksburg. She was in command of Captain Dellie Clark with Captain E. M. Mathes as pilot on the forward watch. About the same time the 1800 h.p. twin screw OUACHITA, a riverboat from Vicksburg, reported at the LeTourneau plant. She was commanded by Captain W. W. Powell as master and Captain Louis O'Donnell as pilot. The JULIE ANN was located in the river at the LeTourneau yard. Her hull was raised out of the water about 9 feet on her legs. On board were Tidwell, Charles Wood and Wayne B. Hughes, who had been resident engineer for Dixilyn during the construction of the rig and whose duty it was to lower and raise the legs when directed to do so by Captain Brechtel. On board also was Lloyd Cotton, a marine engineer in charge of customer relations between LeTourneau and Dixilyn and who was on board as advisor to Dixilyn only. Also on board were a number of Dixilyn employees and a number of electricians and welders employed by LeTourneau. These LeTourneau employees were doing additional [fol. 594] work as the boat was to be towed down the river; but had no connection with the towing or maneuvering of the flotilla whatsoever. Captain Brechtel was the master and in complete charge of the flotilla and had authority over all of Crescent employees.

About 8:00 A.M. on December 26 the two tugboats made up to the JULIE ANN, the TOLTEC to a steel bar across the drilling slot in the stern of the rig and the OUACHITA to the TOLTEC's port side. Captain Brechtel missed connections and failed to arrive at 8 o'clock on December 26. However, Captain Clark, who is a competent tugboat operator, inquired of Hughes if Dixilyn was ready, received a reply that Dixilyn was ready, and thereupon these tugs started out from Vicksburg with the rig. Captain Brechtel was an experienced operator of tugboats on the river and had towed two other LeTourneau drilling rigs down the river prior to this time. The flotilla had no trouble during the voyage down the river until it anchored for the night

a considerable distance above Natchez. Captain Brechtel knew the river, the currents and the dangerous spots, and it was his judgment upon which all of Crescent relied. He joined the flotilla before they left the next morning from the point where they had anchored for the night. Captain Louis O'Donnell of Crescent rode on top of the JULIE ANN control tower and gave signal instructions to Captain Clark by a telephone communications system rigged between the JULIE ANN and the pilot house on the TOL-[fol. 595] TEC. About 2:00 P.M. the flotilla was joined by the tug ORLEANS, which made up to the starboard side of the TOLTEC.

Down the river about 5¾ miles, upstream from Natchez, an electric power line crosses the river. The lowest part of the line was approximately 108 feet above the surface of the river and the depth of the river at that point was 41 feet. At this point the tow was turned around and headed upstream to test the ability of the towing vessels to stop the rig. The legs were lowered approximately 35 feet and the power supplied by the TOLTEC, the OUACHITA and the ORLEANS were sufficient to hold the tow. The power of the TOLTEC was then reduced to allow the JULIE ANN to drift under the power line with the draft of 35 to 45 feet on her legs. After this maneuver the flotilla was moored for the night at a point known as Rifle Point and it was at this place that Captain Brechtel joined the flotilla. No difficulty was encountered from Vicksburg to this point, but care was exercised in coming under the power lines. Captain Brechtel had come by taxi to Natchez and at Natchez he joined Captain Harry Wilson, who was in charge of the United States Engineers' boat, the ORLEANS, and that boat proceeded to Rifle Point with Brechtel and there Captain Brechtel boarded the flotilla. Captain Wilson had informed Captain Brechtel of the various depths of the channel from a point immediately in [fol. 596] front of the Natchez bridge upstream for a distance of two miles or more. Upon arriving at the flotilla, Brechtel went aboard his tug; the ORLEANS, to assist in mooring and then went on the JULIE ANN. After a discussion of the conditions of the river, depth of the water, the dangers of the currents and the location of the rock

ledge, known only to Captain Brechtel, he (Brechtel) determined that 55 feet draft on the legs would be sufficient to clear the rig through the Natchez bridge. The lowest part of the rig was 142.9 feet above mean sea level and Captain Brechtel determined that there was a channel well in excess of 60 feet in depth, approximately 1000 feet wide, extending from Natchez bridge upstream a distance of more than two miles.

About 7:00 A.M. the flotilla was somewhere in the neighborhood of Learned's Mill, about 1¼ miles above the Natchez bridge. The rig was turned around and headed upstream and the legs were lowered to a draft of 35 feet. At this point a test was made of the holding power of the tugs against the tows and in the opinion of Captain Brechtel, with the legs lowered 35 feet the tugs would hold. No test was made at this point, or at any other point, to determine the holding power of the tugs with the legs lowered to a depth of 55 feet, which was required in order to pass under the bridge. Without making a test to a depth of 55 feet, Captain Brechtel, in charge, permitted the flo- [fol. 597] tilla to drift downstream toward the bridge before giving orders or notice to depress the legs. Captain Brechtel, with his knowledge of the river, knew that there was a submarine cable crossing the river about 2,500 feet above the bridge and about 1,500 or 2,000 feet above it there was a rock ledge that made out from the Mississippi shore. He knew that under the bridge there was a right hand set or right hand draft in the current away from the Mississippi bank toward a bridge pier on the West side of the navigation span. He knew this condition of the current had a tendency to force boats into that pier. Without making any further tests, he maneuvered the flotilla toward the Mississippi bank across the rock ledge, and at no time did he bring the flotilla to a stop after having crossed the ledge *or* give any signal to Hughes when to begin to lower the legs. He failed to stop the flotilla after he crossed the dangerous and hazardous rock ledge for Hughes to lower the legs 55 feet and neglected to give Hughes notice when to begin lowering the legs, as he had agreed to do and upon which assurance Hughes relied; and it was Hughes who discovered for himself that a leg was going to strike the

bridge. As the legs were lowered the power of the current was too great for the tugs even to stop the barge, or even slow it down, until Hughes could lower the legs to the necessary depth. The engine on one of the boats was [fol. 598] defective and not sufficient to put forth its full power, but even if it had put forth its full power, still the power of all the tugs would have been insufficient to hold the boat with the legs lowered to a depth of 55 feet. When it was made apparent to Brechtel that the flotilla would not clear, he ordered all boats full speed ahead, but was unable to stop the flotilla or slow it down in time for the legs to be sufficiently lowered. Brechtel contended that Hughes miscalled the reading of the depth of the legs, but I am unable to find from all the testimony in this case that he relied upon such reading or that he had any reason or justification to rely upon same, as the function of Hughes on the JULIE ANN, and only function in so far as the towage was concerned, was to lower or raise the legs when directed so to do by Brechtel. Hughes knew nothing about maneuvering the flotilla and knew nothing about the currents or the danger spots in the river, but insofar as maneuvering a tow down the river, the flotilla was entirely in charge of Captain Brechtel. The *two* itself had no power, but was controlled entirely by the movements of the tugs and the power afforded by the tugs, all of which were under the command of Captain Brechtel. As the flotilla was proceeding under the bridge and Mr. Hughes discovered that it would probably not pass under the bridge unless the tow was slowed down, he began immediately, as soon as he discovered the perilous situation, to lower the legs as rapidly as could be done. He was [fol. 599] guilty of no negligence or carelessness in failing to begin lowering the legs earlier for the reason that he did not know where the rock ledge was and was depending on Captain Brechtel to advise him when to lower the legs. He continued to lower the legs as rapidly as the power afforded under the mechanism would permit him to do. The mechanism and the construction of the legs provide no way by which the lowering can be speeded.

The JULIE ANN, with ~~all of the drilling~~ equipment and paraphernalia on board, probably weighed several hundreds

of tons and it was known to Crescent that towing her down the river would be a very hazardous undertaking. She was a special craft, requiring special skill, management and control. On the voyage down the river Crescent knew that there were some three or four bridges under which she would have to pass. Crescent knew the location of utility lines and pipes which traversed the river and it could be foreseen, or should have been foreseen that unusual care and caution in the undertaking should be exercised. Not to have seen and anticipated this condition of itself would be negligence on the part of Crescent. The task required an unusual and extraordinary amount of power to safely maneuver it. The obligation rested upon Crescent to navigate the flotilla with reasonable care, depending upon that degree of care commensurate with the hazardousness of the undertaking. The JULIE ANN had [fol 600] no power of its own and no one on board who was expected or, under the contract, required to do any of the maneuvering or perform any other function other than to lower the legs or raise the legs when ordered so to do. Crescent owed the duty to third parties to exercise reasonable care in navigating this flotilla down the river commensurate with the unusual and extraordinary circumstances that confronted it. Captain Brechtel realized that it was a very hazardous undertaking to pass under the bridge and did turn around and place the tugs downstream to the JULIE ANN so as to push against her upstream in order to have more holding power. However, Crescent had neglected to furnish sufficient tugs or sufficiently powerful tugs to control and maneuver the barge and her equipment.

Under all the testimony in this case Crescent was negligent in not furnishing sufficient power to hold the JULIE ANN against the current when its legs were being extended to the required depth of 55 feet. The Crescent had had experience in towing heavy tugs and also had experience in towing two flotillas similar to the one that was being towed on this particular occasion, and it should have known the dangers attendant upon an undertaking like this and should have supplied additional tugs or tugs with more power than the combined power of these tugs. The

tug ORLEANS was unable to exert its full power because [fol. 601] of a defective engine which failed at the crucial moment. In reaching this conclusion I am not taking into consideration the testimony that when they reached the Baton Rouge bridge Crescent supplied an additional tug for the purpose of safely navigating under that bridge. I excluded this from consideration because it is something that happened after the occurrence at the Natchez bridge, but after excluding this testimony I find that Crescent knew or should have known that the power was insufficient. Captain Brechtel, who was in complete charge and control of the flotilla, was also guilty of negligence in not completely stopping the flotilla and lowering the legs to a depth of 55 feet before it reached the Natchez bridge. He knew that the current was running 4 or 5 miles an hour and knew that when the spuds were lowered to 55 feet it would be very difficult to control the flotilla because of the increased power of the current propelling the flotilla downstream and should have taken precautions to have had the legs lowered in ample time to have passed under the bridge safely. He was negligent in not making a test of the holding power of the barges with the legs lowered 55 feet when he was some two or three miles upstream from the bridge. He was negligent in his failure to notify Hughes earlier when to lower the legs and in not stopping immediately after he crossed the rock ledge in order for Hughes to have lowered the legs to a depth of 55 feet. Hughes exercised reasonable care when he began to lower the legs as [fol. 602] soon as he saw and appreciated the danger confronting him and was guilty of no negligence that in any way contributed to the collision.

Under these facts, as a matter of law, the Crescent is liable for all the damages. Many authorities could be cited to sustain this view, but sufficient is the case of The Ames and The Carroll No. 20 and The Edwin Chilton, 66 Fed. (2) 413; The Clarence P. Howland, 16 Fed. (2) 25.

The second question presented by this record for determination is whether or not the Dixilyn agreed to indemnify Crescent for any and all damages that might be suffered by third parties and, as heretofore stated, Crescent relies upon the second letter of December 23. The evidence and corre-

spondence is clear to the effect that Dixilyn declined so to do and declined to execute the towage release clause requested by Crescent. Crescent, of course, knew before the refusal of Dixilyn to execute those documents that Dixilyn did not intend to release Crescent from any liability to third parties due to the negligence of Crescent. In order for one to release the other party for damages due to its own negligence, the contract of indemnity must be clear and definite in its terms that such is the intention. Batson-Cook Co. v. Industrial Steel Erectors, 257 Fed. (2) 410; Standard Oil Co. of Texas v. Wampler, 218 Fed. (2) 768; Bisso v. Island Waterways Corpn., 349 U. S. 85.

[fol. 603] Since the damages to the bridge flowed from the negligence of Crescent, it is clear under the above authorities that Dixilyn did not indemnify or agree to indemnify Crescent by its letter of December 23. Southwestern Sugar & Molasses Co. v. River Terminal Corpn., 360 U. S. 411, is not in conflict with Bisso and in no way overturns the holding in the Bisso case. All the authorities cited by Crescent have been given careful study, but are not applicable to the facts of the present case and it would unduly prolong the length of this opinion to undertake to differentiate them. The authorities that have been cited hereinabove are *conupon* the legal issues presented. The facts as herein stated and the law as herein declared constitute my finding of fact and conclusion of law.

Libelants in the case are entitled to a judgment in the sum of $41,363.24 against the Crescent Towing & Salvage Company, Inc., and the liability of the Crescent Towing & Salvage Company, Inc. is established for that amount. The cross bill of Crescent Towing & Salvage Company will be dismissed.

This, the 5th day of December, 1960.

Sidney C. Mize, United States District Judge.

[fol. 604]

IN UNITED STATES DISTRICT COURT

FINAL DECREE—Filed February 6, 1961

This cause having come on for hearing on the pleadings and proof of the respective parties, and the Court having considered the arguments and briefs of the respective proctors, and Crescent Towing & Salvage Company, Inc. and Dixilyn Drilling Corporation having, on April 25, 1960, with the consent and approval of the Court, jointly satisfied the claim of libellants in the total amount of $41,363.24, the said parties having stipulated that they or either one of them were responsible for the damages sustained by the bridge, and that this litigation should continue as to them in order that the Court might find liability as to either or both of them and render a decree accordingly, and the Court having approved such stipulation, and having concluded that the damages suffered by the bridge were caused solely by the fault of Crescent Towing & Salvage Company, Inc., and the Court having rendered a written opinion dated December 5, 1960 which is hereby adopted as its findings of fact and conclusions of law pursuant to Supreme Court Admiralty Rule 46½,

Now Therefore, on motion of Royston, Rayzor and Cook, proctors for respondents, Dixilyn Drilling Corporation, it is

Ordered, Adjudged and Decreed that Dixilyn Drilling Corporation recover of and from Crescent Towing & Sal-
[fol. 605] vage Company, Inc. one half of the amount of the damage suffered by the bridge and paid to libellants, to wit: the sum of $20,681.62; with interest thereon from April 25, 1960, at the rate of five (5) per cent per annum until paid; and it is further

Ordered, Adjudged and Decreed that the petition filed under the 56th Admiralty Rule by Crescent Towing & Salvage Company, Inc. against Dixilyn Drilling Corporation be and the same hereby is dismissed; and it is further

Ordered, Adjudged and Decreed that all costs herein be borne by Crescent Towing & Salvage Company, Inc.

Gulfport, Mississippi, this 4th day of February, 1961.

S. C. Mize, United States District Judge.

Approved as to Form:

C. L. Collins, Proctor for Libellants.

Brunini, Everett, Grantham & Quin; Lemle & Kelleher, By Charles Kohlmeyer, Jr., Proctors for Respondent, Crescent Towing & Salvage Company, Inc.

Watkins & Eager; Royston, Rayzor & Cook, By Thos. H. Watkins, Proctors for Respondent, Dixilyn Drilling Corporation.

Filed and entered OB 1961 pages 20 and 21.

[fol. 625]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

ARGUMENT AND SUBMISSION—January 8, 1962

No. 19148

CRESCENT TOWING & SALVAGE COMPANY

versus

DIXILYN DRILLING CORPORATION

On this day this cause was called, and after argument by Charles Kohlmeyer, Jr., Esq., for appellant, and E. D. Vickery, Esq., for appellee, was submitted to the Court.

[fol. 626]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19148

CRESCENT TOWING & SALVAGE COMPANY, Appellant,
versus
DIXILYN DRILLING CORPORATION, Appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

OPINION—Filed May 9, 1962

Before Tuttle, Chief Judge, and Rives and Wisdom, Circuit Judges.

Rives, Circuit Judge: The appellant (Crescent) and the appellee (Dixilyn) were respondents to a libel filed by the Mississippi State Highway Commission, the City of Natchez, and the Highway Department of the State of Louisiana for $41,363.24 damages sustained by the Natchez-Vidalia Bridge when Dixilyn's Julie Ann, an offshore drill-[fol. 627] ing barge, collided with the underside of the bridge. The Julie Ann was being towed down the Mississippi River by Crescent pursuant to its contract with Dixilyn. Crescent and Dixilyn jointly paid the amount of the libelants' claim under a stipulation approved by the court, which provided in part that "the libelees, as between themselves, may litigate to a final conclusion all questions of negligence, liability, contribution, indemnity and ultimate responsibility on the part of each or both of the libelees." After a full trial on the merits, the district court entered a final decree holding Crescent solely at fault and liable to repay to Dixilyn its half of the satisfied claim with interest and costs.[1]

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[1] The opinion of the district court is reported as Mississippi Highway Commission, et al. v. Dixilyn Drilling Corporation, et al., S.D. Miss., 198 F. Supp. 788.

The district court found Crescent at fault for not furnishing enough power to hold the Julie Ann while her legs were lowered sufficiently to clear the underside of the bridge, and that Crescent's Tug Orleans had an engine failure which caused or contributed to the lack of sufficient power. It further found that Crescent's Captain Brechtel was guilty of negligence in failing to make an earlier test of the holding power of the tugs with the legs lowered to the required depth, in not causing the Julie Ann to be brought to a complete stop for the lowering of her legs, and in failing to notify Dixilyn's employee Hughes at an earlier time to start the lowering of the legs. Those findings are vigorously attacked by Crescent as clearly erroneous, and Crescent insists that the collision was caused by a misunderstanding of the Dixilyn personnel aboard Julie Ann as to the operation of her legs, and by their failure properly to call the draft of the legs, thereby leading Captain [fol. 628] Brechtel to the belief that the legs would clear the underside of the bridge.

A review of the district court's findings of fact would confront us with an extremely difficult decision. Instead, we examine first the towage contract between Dixilyn and Crescent. If that contract validly shifted liability for the collision damages to Dixilyn or its insurer, whether or not Crescent was negligent, the fact findings as to negligence are immaterial.

The facts necessary for our consideration of the towage contract are not in substantial dispute, and are restated largely from the briefs of the parties.

The Julie Ann, constructed at the LeTourneau plant at Vicksburg, is a self-contained, submersible type drilling rig. She is 193 feet long, 151 feet wide, and has a displacement of 2500 tons. She is triangular in shape, with legs of open truss steel frame construction 175 feet long set on each corner of the triangle. Approximately 30 feet of the legs had not been installed at the time of the collision. The lower end of each leg consists of spud tanks or feet 35 feet in diameter and about 35 feet in height. The legs provide a tripod on which the hull of the barge can be raised or lowered for drilling operations or for navigational purposes. The legs are operated from a control room situated above

the quarters. They are lowered and retracted by three 60 cycle motors powered by three generators, any one of which is capable of lowering or retracting all three legs simultaneously. The legs are controlled by three levers, all of which can be manipulated so that each leg can be raised or lowered by itself or with one or both of the other legs. [fol. 629] The barge hull itself is 20 feet in depth (from main deck to bottom), and at the time of the collision the hull afloat was drawing approximately 13 feet. Below the main deck is a machinery deck containing a complex of equipment and tanks necessary for drilling operations, including mud tanks, water tanks, and fuel tanks. On the main deck are located draw works, pipe racks and anchor winches. Two story living quarters are situated above the main deck, completely equipped as spacious and comfortable accommodations for 45 men, all air-conditioned and equipped with a modern galley, laundry and recreation lounge. The rig is a complete self-contained unit, capable of drilling in more than 100 feet of water, and includes in her equipment slush pumps, a Schlumberger unit, cement unit, mud lab, water evaporator, mud pits and mixers, jets and guns, six diesel engines, and six electric generators.

The Natchez-Vidalia bridge is a fixed highway bridge over the Mississippi River. The lowest member of the bridge is 142.9 feet above mean sea-level. The surface of the river at the bridge is 17.28 feet above mean sea level at zero on the Natchez gauge. On December 27, 1957, the date of the collision, the Natchez gauge reading was 33.2 feet, so that there was a clearance of 92.4 feet between the surface of the water and the lowest steel on the bottom side of the bridge. The legs of the rig being 143 feet long, they had to be lowered so that at least 51 feet were below the water in order for the rig safely to clear under the bridge. The legs could not be lowered to a depth that would cause them to foul on the river bottom during the approach to the bridge.

The channel of the river (the deepest portion, in which [fol. 630] safe navigation is afforded) approaching the bridge is no less than 1200 feet wide for a substantial distance above it. The contour of the bottom, however, is not level a short distance above the bridge, there being a

ledge or bar less than 55 feet below the surface about 2500 feet above the bridge. Accordingly, until the flotilla passed that point, it was impractical for the legs to have been lowered more than 35 feet. All of these facts were generally known, although, of course, the exact level of the water and the exact conditions which would be encountered on the day that the proposed movement would take place could not be foreseen in advance.

The Julie Ann was scheduled for departure from the builder's yard at Vicksburg for the day after Christmas. Upon hearing that the rig was nearing completion, Crescent solicited the business of towing her to New Orleans, and a letter of solicitation was written. Whether due to this solicitation or otherwise, Dixilyn contacted Crescent in mid-December and suggested a meeting to negotiate a towage contract. A meeting was held at Dixilyn's office in New Orleans in mid-December, attended by Messrs. Tidwell, Boring and Brigham, corporate officers of Dixilyn, Messrs. Wood and Blakely, whose capacity will be hereafter adverted to, and Messrs. Apgar, Smith and Lanman of Crescent. (Mr. Lanman died prior to the trial.) At this meeting, there was a discussion of the general characteristics of the rig and of the timing of the movement, and it was tentatively agreed that Crescent would undertake the towage. Mr. Wood specified that he desired Captain Brechtel to be in charge of the tow, because he had brought one or more rigs down the river on prior occasions. Crescent stated that it proposed to use Captain Brechtel with its small Tug [fol. 631] Orleans and two upriver push boats, the Toltec and the Ouachita, if those vessels were available. The navigation of the flotilla was to be under the command of Crescent's pilot, Captain Brechtel.

The Toltec is a triple screw, 3975 horsepower push boat, 130 feet long by 30 feet wide. It was only six months old at the time of the collision and was the sixth most powerful towboat then running on the Mississippi River. The Ouachita is a twin screw, 1800 horsepower push boat, 90 feet long by 26 feet wide. The Orleans is a single screw tug of 700 horsepower, 100 feet long by 26 feet wide.

The exact role of Mr. Wood does not appear by the evidence. Mr. Wood died before the case was tried, and Mr.

Blakely was not called to testify. Wood, however, was the president and owner of a marine surveying company in New Orleans and had had substantial experience in the engineering and moving of submersible drilling rigs comparable to Julie Ann. Blakely was one of his staff. Evidently they represented Dixilyn in this instance, or Dixilyn's underwriters, for they were at the meeting and participated in the conference and did not represent or have any connection with Crescent.

The district court found that the question of a provision in the towage agreement releasing Crescent of all liability was not determined at that meeting, and that nothing definite was agreed on other than that Crescent would undertake the towage and would place it in charge of Captain Brechtel.

Following the discussion at the meeting, Crescent's vice [fol. 632] president, Mr. Apgar, after consulting with its admiralty counsel, Mr. Kohlmeyer, wrote a letter to Dixilyn as follows:

"December 19, 1957

"Dixilyn Drilling Corp.
Saratoga Building
New Orleans, Louisiana.

"Attention: Mr. H. Brighan
Executive Vice President

"Subj: 'JULIE ANN' From Vicksburg
December 26th, 1957

"Gentlemen:

"We wish to confirm our recent conversation including Mr. M. O. Boring, Jr. and Mr. Mike Smith, in which we discussed the towing of the 'JULIE ANN' from Vicksburg to our Fleet Landing in the New Orleans harbor.

"We understand that the 'JULIE ANN' will be ready to leave Vicksburg the morning of December 26th and we expect to be in Vicksburg ready to move her at that time; we contemplate using two river pushboats (towboats) of substantial horsepower and one

tugboat. For the trip from New Orleans to her offshore location, seagoing tugboats will be used.

[fol. 633] "This tow will be performed by Crescent subject to towage release clause, copy of which is attached and is part of our agreement with you; it being mutually understood and agreed that in consideration of including this clause lower rates prevail. It is also necessary that we (Crescent Towing & Salvage Co., Inc.) be included in the 'JULIE ANN' hull and P & I Insurance coverage and we will appreciate receiving a letter or telegram from your underwriters or brokers to this effect as soon as possible.

"We will continue to keep in touch with your office and know that you will advise us if there is any change in the anticipated readiness of the rig at Vicksburg. We appreciate very much your calling upon us to tow the 'JULIE ANN.'

"Very truly yours,

"CRESCENT TOWING & SALVAGE CO., INC.

"By /s/ Warren C. Apgar
"VICE PRESIDENT.

WCA:m
Encl. (1)

cc - Mr. Pic
Rate files

[fol. 634]

"TOWER'S RELEASE CLAUSE

"All towage will be performed solely at the risk of the craft towed and its cargo, including the risk of negligence of the master, pilot and crew of the towing craft and our employees, agents and representatives, all of whom in respect to the towage shall become and be the servants of the craft towed and its owners and operators; provided that nothing herein contained shall be construed as making the craft towed, its owners or operators, liable or responsible for loss of or damage

to the towing craft or property owned by third parties or for loss of life or personal injury for which the craft towed, its owners or operators, would not otherwise be liable or responsible. Neither we nor the towing craft nor its owners or operators shall be liable, and the craft towed and its owners and operators shall hold us and the towing craft and its owners and operators harmless from any liability, for any loss of or damage to the craft towed and its cargo from any cause whatsoever, including loss or damage caused by negligence of the master, pilot and crew of the towing craft and our employees, agents and representative. We reserve the right to tow all vessels singly or with other craft and to change craft towed from one to another tow as frequently as we may find it convenient to do so. Release of craft to be towed to any vessel owned or used by us for towage shall be conclusive evidence of the acceptance of these conditions."

[fol. 635] The letter was referred by Dixilyn to representatives of the underwriters of the barge, and they were dissatisfied with the "Tower's Release Clause." Mr. Tidwell of Dixilyn called Mr. Apgar of Crescent and told him simply that the clause was not acceptable. Crescent submitted to Dixilyn a second letter, one sentence of which, as indicated, was found objectionable:

"December 23, 1957

"Dixilyn Drilling Corporation
Saratoga Building
New Orleans, Louisiana.

"Gentlemen:

"With further reference to our undertaking to tow your drilling barge JULIE ANN from Vicksburg to our Fleet Landing in New Orleans and then down the Mississippi River into the Gulf, we confirm that the following additional clause shall be included in the contract as part of the consideration for our undertaking the towage:

"~~You agree to indemnify us, our tugs and equipment and all other parties taking part in the towage and their equipment and our and their underwriters of and from any and all liability or claims which may arise out of the towage of the drilling barge.~~ It is particularly understood and agreed that you are authorized to and by this agreement do release and relieve us from any liability for account of your underwriters [fol. 636] and that any damage claims urged by third parties as well as any claim which may be urged by virtue of damage to the drilling rig in the course of the towage shall be for your account and account of your underwriters.

"It is further understood that the amount of the insurance protection which you have in force equals the value of the hull of the barge as to hull insurance and amounts to four million dollars as to third party claims.

"If the foregoing meets with your approval and represents this portion of our agreement, please sign and return to us the attached three copies of this letter, retaining the original and the other copy for your files.

"Very truly yours,

"Crescent Towing & Salvage Co., Inc.

"By /s/ Warren C. Apgar
"Vice President.

WCA:m

"Approved:

"Dixilyn Drilling Corporation

By: ..... (Not Signed.)"

The circumstances under which the letter was redrafted [fol. 637] with the objectionable clause omitted are thus stated in the testimony of Mr. Tidwell of Dixilyn:

"Well, when I received the letter, I didn't understand it, so I had been advised and been discussing the matter with Mr. Griffin and Mr. Stentz, who are

with Southern Marine and Aviation Underwriters, so I called them when I received this letter and read it to them on the phone and asked them if it was all right for me to sign it or normal procedure for me to sign it. So they had me to read it again and studied it and talked about it. So there was one sentence in there they said they wouldn't like to sign at all with that sentence in it.

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"They said they wouldn't like for me to sign that letter at all with that one sentence in it and said, in fact, all the letter was objectionable, that they wouldn't like for me to sign it at all, but I could go ahead and sign it with that one sentence if it was stricken out, and said even though the rest of the letter—'We don't like it; it's been proven that it's not legal by a prior case in court; that it's not a legal document, but if they insist on you signing it, it will be all right to go ahead but we don't like it, but you can sign the rest of it.' So I called Mr. Apgar and told him I couldn't sign it at all with that one sentence in it; that I would sign it if they would strike that sentence out. So he said, 'Well, we'll re-write the letter verbatim, just leaving out that sentence.' And he wanted to know if I would sign it if they would do that. He did; sent me another [fol. 638] letter, and I called Mr. Griffin and Stentz and read that letter to them and told them it was exactly the same except that one sentence was left out, and they advised me to go ahead and sign it. That is why I signed it, on their advice, because I felt like I needed some help because I didn't understand it. But I did sign it, not understanding, on their advice."

As indicated, the letter was redrafted with the objectionable sentence omitted and, as thus redrafted, was signed by Mr. Apgar for Crescent and by Mr. Tidwell for Dixilyn.[2]

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[2] The consideration and other details were agreed upon verbally.

As to whether the towage contract should be construed to shift to Dixilyn liability for collision damages in any event, including damages due to negligence of Crescent, the district court held:

> "The second question presented by this record for determination is whether or not the Dixilyn agreed to indemnify Crescent for any and all damages that might be suffered by third parties and, as heretofore stated, Crescent relies upon the second letter of December 23. The evidence and correspondence is clear to the effect that Dixilyn declined so to do and declined to execute the towage release clause requested by Crescent. Crescent, of course, knew before the refusal of Dixilyn to execute those documents that Dixilyn did not intend to release Crescent from any liability to third parties due to the negligence of Cres- [fol. 639] cent. In order for one to release the other party for damages due to its own negligence, the contract of indemnity must be clear and definite in its terms that such is the intention . . .
>
> "Since the damages to the bridge flowed from the negligence of Crescent, it is clear under the above authorities that Dixilyn did not indemnify or agree to indemnify Crescent by its letter of December 23."

We have re-stated all of the evidence in the record which would support the district court's finding as to the intent of Dixilyn and as to Crescent's knowledge or notice of that intent. Mr. Tidwell signed the letter contract on behalf of Dixilyn in reliance upon advice from Griffin and Stentz, the underwriter's representatives. That advice was not communicated to Crescent, nor was Crescent advised of the reasoning or intention upon which that advice was based. Actually the advice which Griffin and Stentz gave Tidwell recognized that the meaning and intent of the contract were unfavorable to Dixilyn, but expressed the view that the contract was illegal. "We don't like it; it's been proven that it's not legal by a prior case in court; that it's not a legal document, but if they insist on you signing

it, it will be all right to go ahead but we don't like it, but you can sign the rest of it."

Dixilyn's rejection of the Tower's Release Clause attached to Crescent's letter of December 19 and its rejection of the sentence stricken from Crescent's first letter of December 23 are not necessarily inconsistent with an intent on the part of Dixilyn to release Crescent from any liability to [fol. 640] third parties due to the negligence of Crescent. To the contrary, Dixilyn's refusal to accept the Tower's Release Clause and its insistence on eliminating the sentence from the letter may have been because Dixilyn was not willing to accept liability (1) for fault and negligence on the part of Toltec and Ouachita and their owners, and (2) for collision damages occasioned by Crescent's tug Orleans on its voyage up river to pick up the Julie Ann. If the second letter of December 23 which Dixilyn approved as a part of the agreement of towage expressed plainly and unequivocally that Dixilyn accepted liability for any damage claims of third parties, including those caused by Crescent's negligence, or that Crescent was to have the benefit of Dixilyn's insurance, then the intention so expressed is not inconsistent with Dixilyn's earlier rejections of the Tower's Release Clause and of the sentence stricken from Crescent's first letter of December 23. On the other hand, if that letter is doubtful or ambiguous, then we should place ourselves as nearly as possible in the situation of the parties and should consider the language of the agreement in the light of the previous meeting and correspondence and of all of the attendant and surrounding circumstances. Compare Restatement of Contracts, Sections 230-235.

> "The cardinal rule of interpretation of indemnity contracts is the same as in the case of other types of contracts, namely, the ascertainment of the intention of the parties." Annotation 175 A.L.R. 29.

This Court has held in many cases that the failure of an indemnity contract to refer expressly to negligence evi-

[fol. 641] dences an intention not to indemnify against losses resulting from the indemnitee's negligence.[3]

In two cases where the contract did expressly refer to negligence, it was held to provide indemnity for losses resulting from the indemnitee's negligence.[4]

The more recent case of *Batson Cook Co.* v. *Industrial Steel Erectors*, cited in note 2, *supra*, while holding against the indemnitee, did so both because of failure to use the "talismanic words," and also because of inability "to find the equivalent clear intent in other language of the agreement." 257 F. 2d at 412. Finally, our most recent opinion on the subject expressed the view that the rule requiring that, in order to relieve the indemnitee from liability for losses caused by his own negligence, the contract must contain an express stipulation to that effect "rests on an unsound and dangerous foundation" for reasons well stated by Chief Judge Tuttle:

> "It presumes, first of all, that one party's assumption of liability for losses due to another's negligence is an 'unusual' and 'hazardous' undertaking. We cannot agree. In the light of modern conditions, we perceive little justification for so characterizing the in- [fol. 642] demnitor's obligation. Insurance companies assume this obligation every day, especially in connection with automobile liability policies. And, it is common knowledge that the device of insuring against one's own negligence through indemnity contracts is frequently employed in other business ventures.
>
> "Perhaps more important, even assuming that the burden imposed on the indemnitor is 'unusual' or

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[3] Southern Bell Telephone & Tel. Co. v. Mayor & Aldermen of Meridian, 5 Cir., 1935, 74 F. 2d 983, 986; Halliburton Oil Well Co. v. Paulk, 5 Cir., 1950, 180 F. 2d 79, 84; Martin v. American Optical Co., 5 Cir., 1950, 184 F. 2d 528, 529; W. C. Shepherd Co. v. Royal Indemnity Co., 5 Cir., 1951, 192 F. 2d 710, 717; Standard Oil Co. v. Wampler, 5 Cir., 1955, 218 F. 2d 768, 770; Batson Cook Co. v. Industrial Steel Erectors, 5 Cir., 1958, 257 F. 2d 410, 412, et seq.

[4] Thomas v. Atlantic Coast Line R. Co., 5 Cir., 1953, 201 F. 2d 167, 169; A.G.S. R. Co. v. L&N R. Co., 5 Cir., 1955, 224 F. 2d 1, 4.

'hazardous', the majority rule presumes that courts have the power to alleviate or eliminate this burden by construing the indemnity agreement in a manner which is patently inconsistent with the plain and clear meaning of the language employed by the contracting parties. This is a dangerous and unwarranted extension of the judicial function. If a court feels that contract imposes an extraordinary liability on one of the parties, it may, in certain instances, pronounce the contract void as being contrary to public policy. But where, as here, a contract does not violate public policy, we have no authority to achieve the same result by concluding that the parties did not really mean what the unambiguous language of their agreement imports."

Jacksonville Terminal Co. v. *Railway Express Agency, Inc.*, 5 Cir., 1962, 296 F. 2d 256, 262, 263.[5]

[fol. 643] Thus the strict rule so frequently expressed in the cases appears to be giving way somewhat to the modern practice of providing liability insurance, and of bargaining as to which party shall bear the expense of such insurance. According to Mr. Apgar's testimony that expense was large; recently, in towing another drilling rig, Crescent had been charged one per cent of the value of the craft to be towed as a premium to protect for the one trip against liability for any damages. If Crescent had assumed that expense, it would have been reflected in its charge for towage. Actually, the rate charged on the Tug Orleans was $35.00 an hour, which Mr. Apgar testified was the customary charge for a normal operation with the Orleans.[6]

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[5] We recognize that a part of this criticism does not apply to a case of admiralty or maritime jurisdiction in view of the more extensive power of the Supreme Court in such cases. See Gilmore & Black, The Law of Admiralty, Sec. 1-16, pp. 40-42.

[6] Crescent was authorized to contract for the services of the other tugs, the Ouachita and Toltec, at the best rates available, and was not questioned on that part of the transaction.

The letter contract plainly stated that the "additional clause" was "part of the consideration for our undertaking the towage."[7] The contract then provided:

> "It is particularly understood and agreed that you are authorized to and by this agreement do release and relieve us from any liability for account of your underwriters and that any damage claims urged by third parties as well as any claim which may be urged by virtue of damage to the drilling rig in the course of the towage shall be for your account and account of your underwriters."

Some liability might have rested on Crescent for unsea- [fol. 644] worthiness not caused by negligence, but the most substantial liability to which Crescent might be subjected was that based on its own real or claimed negligence. If "any claims urged by third parties," as used in the exculpatory sentence, is interpreted not to include claims based on Crescent's negligence, then the provision is deprived of any real meaning.[8]

If Dixilyn had any doubt of Crescent's intention that doubt should be removed by the next paragraph of the letter:

> "It is further understood that the amount of the insurance protection which you have in force equals the value of the hull of the barge as to hull insurance and amounts to four million dollars as to third party claims."

Why should Crescent be interested in Dixilyn's insurance unless that was meant also to protect Crescent? As to third-party claims, Dixilyn's insurance was to amount to four million dollars. When that agreement is coupled with

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[7] In its letter of December 19, to which the proposed "Tower's Release Clause" was attached, Crescent had stated "it being mutually understood and agreed that in consideration of including this clause lower rates prevail."

[8] The "Tower's Release Clause" attached to Crescent's letter of December 19 had put Dixilyn on notice that Crescent was seeking indemnity against losses resulting from its own negligence.

the agreement in the preceding paragraph "that any damage claims urged by third parties . . . in the course of the towage shall be for your account and account of your underwriters," the conclusion is inescapable that Dixilyn agreed to afford Crescent the benefit of Dixilyn's insurance. There seems little doubt that Griffin and Stentz, representatives of Dixilyn's underwriters, clearly understood Crescent's intent, but chose to rely on their opinion that [fol. 645] ". . . it's been proven that it's not legal by a prior case in court . . ."

The district court having held that the contract was not sufficiently specific to require Dixilyn to indemnify Crescent against third-party claims based on Crescent's negligence, or to bind Dixilyn to afford Crescent the benefit of Dixilyn's liability insurance, did not reach the question of whether such a contract is valid. The "prior case in court" which led Giffen and Stentz to think the contract invalid was, in all probability, *Bisso* v. *Inland Waterways Corporation*, 1955, 349 U. S. 85, or its companion case, *Boston Metals Co.* v. *The Winding Gulf*, 1955, 349 U. S. 122. In those cases the Supreme Court created, or accepted as based upon public policy, a judicial rule in admiralty invalidating contracts releasing towers from all liability for their negligence.[9]

In *Southwestern Sugar & Molasses Co., Inc.* v. *River Terminals Corp.*, 1959, 360 U. S. 411, the Court held that where the exculpatory clause had been filed as part of a tariff with the Interstate Commerce Commission it should not be struck down as a matter of law until the parties had been afforded a reasonable opportunity to obtain the views of the Commission, and stated:

> "The rule of *Bisso*, however applicable where the towboat owner has 'the power to drive hard bargains,' may well call for modification when that power is ef-

[9] Mr. Justice Black delivered the opinion of the Court in *Bisso* with the concurrence of the Chief Justice and of Justices Clark and Minton. Justice Douglas wrote a separate concurring opinion and Justice Frankfurter wrote a full dissenting opinion in which he was joined by Justices Reed and Burton. Justice Harlan did not participate.

[fol. 646] fectively controlled by a persuasive regulatory scheme.

"Further, it may be noted that the clause relied on in this case is by its terms restricted to the situation where shipments are transported to barges furnished by others than the towboat owner. Whatever may be the considerations involved in forbidding a towboat to contract for exemption from liability for negligence in other circumstances, it may be that different considerations apply when the towboat moves barges which are delivered to it loaded, so that it never has an opportunity adequately to inspect them below the waterline, and which, if defective, may create emergency situations where a small degree of negligence can readily lead to very substantial monetary loss. *If the peculiar hazards involved in towing a barge supplied by the shipper are great, and the methods of guarding against those hazards uncertain, it may be that in an area where Congress has not, expressly or by fair implication, declared for a particular result, the federal courts should creatively exercise their responsibility for the development of the law maritime to fashion a particularized rule to deal with particularized circumstances.*" (Emphasis supplied.)

360 U.S. 418, 419, 420.

Virtually the same distinction suggested in the part of the last quotation which we have emphasized was adopted by the Second Circuit in an opinion by Judge Frank the [fol. 647] year before the decision in *Bisso*. *North River Barge Line* v. *Chile S.S. Co.*, 2 Cir., 1954, 213 F. 2d 882. The Southern District of New York has since held that the strictures of *Bisso* is not applicable to invalidate an exculpatory clause where the tower had undertaken to tow a scow in an ice-clogged river. The district court said:

"Here, the tower, perceiving that there was unusual danger in towing in ice, made it a condition of his assuming a contract of towage that he be spared the difficulty and expense of defending himself in lawsuits resulting from accidents which were likely to result in the extrahazardous situation into which the tow owner

had voluntarily put his property. Accordingly, the strictures of the Bisso case is not applicable to the limited relief from liability at issue."

Chile Steamship Co. v. *The Justine McAllister*, S.D. N.Y., 1958, 168 F. Supp. 700, 702.

The rationale of the rule in *Bisso* was thus expressed in the opinion of the Court:

"The two main reasons for the creation and application of the rule have been (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains."

Bisso v. *Inland Waterways Corp.*, *supra*, 349 U. S. at 91. [fol. 648] Reason (1) is inapplicable to the facts of the present case upon much the same ground as that expressed in *Southwestern Sugar & Molasses Co., Inc.* v. *River Terminals Corp.*, *supra*. Reason (2) is clearly inapplicable to the facts of this case. Crescent's acquiescence in Dixilyn's rejections of two exculpatory provisions indicates that there was no economic pressure exercised by Crescent in the negotiation of the contract. The evidence showed that Crescent had competition on movements of this kind from three harbor towing companies in New Orleans and from others in Mobile and in the Galveston-Houston area. Crescent was in no position to overreach Dixilyn or to drive a hard bargain. We conclude that, under all of the circumstances of this case, the *Bisso* rule is not applicable to prevent Dixilyn from indemnifying Crescent against third-party claims based on Crescent's negligence or to prevent Dixilyn from binding itself to afford Crescent the benefit of Dixilyn's liability insurance.

It was stipulated that Crescent carried hull insurance and protection and indemnity insurance on the tug Orleans in an amount more than sufficient to cover the amount of the claims of the libelants in this case. Dixilyn insists that, if it must indemnify Crescent, the measure of damages is the cost of Crescent's insurance and relies on *Standard Oil*

Co. of Texas v. *Wampler*, 5 Cir., 1955, 218 F. 2d 768, 771. In that case, Standard, after being furnished a certificate showing that the policy of insurance secured by Wampler did not protect Standard, made no objection. Judge Allred writing for this Court said:

> "Under these circumstances, it seems to us the [fol. 649] proper measure of damages would be the premiums paid for this insurance.'

'Cf. Capital Life, Ins. Co. v. Driscoll, Tex. Civ. App., 199 S.W. 872, 875."

The Court of Civil Appeals of Texas, in the case cited, had said:

> "Where an applicant contracts for a certain character of insurance policy and such policy is refused, and he can then only obtain a like policy at an increased annual premium, the proper measure of damages; we think, is the difference between the premiums of the policy contracted for and the policy he can get." (199 S.W. at 875.)

In the instant case Crescent had received no notice prior to the collision that Dixilyn had failed to obtain insurance to indemnify it and Crescent against third-party claims whether based on Crescent's negligence or not.[10] This case is therefore distinguishable from *Standard Oil Co. of Texas* v. *Wampler*, *supra*, and Dixilyn is liable to Crescent for the amount, with interest and costs, paid by Crescent to the libelants. The judgment is reversed and the cause remanded for the entry of a judgment consistent with this opinion.

REVERSED WITH DIRECTIONS.

[10] We, of course, intimate no opinion as to whether either Crescent or Dixilyn has a claim against Dixilyn's underwriters since

[fol. 650]

IN UNITED STATES COURT OF APPEALS

No. 19148

CRESCENT TOWING & SALVAGE COMPANY

versus

DIXILYN DRILLING COMPANY

JUDGMENT—May 9, 1962

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for the entry of a judgment consistent with the opinion of this Court;

It is further ordered, adjudged and decreed that the appellee, Dixilyn Drilling Corporation be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

[fol. 651] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 652]

SUPREME COURT OF THE UNITED STATES

No. 297—October Term, 1962

DIXILYN DRILLING CORPORATION, Petitioner,

vs.

CRESCENT TOWING & SALVAGE COMPANY

ORDER ALLOWING CERTIORARI—October 15, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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NO. _____

IN THE

Supreme Court of the United States

October Term, 1962

DIXILYN DRILLING CORPORATION, *Petitioner*

-versus-

CRESCENT TOWING & SALVAGE COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on May 9, 1962.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is printed as Appendix "A" hereto, infra, page 34, and is not yet reported. The opinion of the United States District Court for the Southern District of Mississippi is printed as Appendix "B" hereto, infra, page 56 and is reported in 198 F. Supp. 788.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 9, 1962 (page 33, infra). The jurisdiction of this Court is invoked under 28 *U.S.C.* Section 1254(1).

QUESTIONS PRESENTED

1. Is an exception to be made to this Court's admiralty rule of law "based on public policy, invalidating contracts, releasing towers from all liability for their negligence."[1]

2. If such an exception is to be made to this *Bisso* rule, must the contract between the parties clearly express in unequivocal terms their intention for the craft being towed to indemnify the tower from the consequences of the tower's own negligence?[2]

STATEMENT

The Petitioner, Dixilyn Drilling Corporation, contracted with the Respondent, Crescent Towing & Salvage Company, to supply the necessary tugs to tow Petitioner's offshore drilling barge, JULIE ANN, down the Mississippi River from Vicksburg, Mississippi to New Orleans, Louisiana. In the course of the towage, one of the legs of the

[1]Rule quoted directly from **Bisso v. Inland Waterways Corporation**, 349 U.S. 85, at page 90, 99 L.Ed. 911, at page 917, 75 S.Ct. 629, 1955 A.M.C. 899, at page 904 (1955).

[2]The Court below held, contrary to eight of its earlier decisions, that such intention no longer had to be expressed in unequivocal terms, but where the contract of indemnity used "doubtful or ambiguous" terms, that the Court would look to the conferences and negotiations and correspondence and the attendant and surrounding circumstances leading up to the execution of the contract in an effort to try to determine the intention of the parties.

drilling barge struck the Natchez Bridge across the Mississippi River because of the inability of the tugs supplied by Crescent to stop the drilling barge above the bridge until such time as the legs on the drilling barge were lowered to the proper depth to clear the bridge. Crescent supplied three tugs to perform the towage, and it is undisputed that the navigation of the flotilla, consisting of these three tugs and the drilling barge, was completely controlled by Crescent's own pilot, a Captain Brechtel, and that Dixilyn's sole function was to lower the three legs on the drilling barge to the proper depth upon receiving instructions from Crescent's Captain Brechtel to do so.

The owners of the bridge sued Crescent to recover their damages and Crescent impleaded Dixilyn claiming that Dixilyn's negligence caused the damages and in the alternative, that if Crescent was negligent and therefore liable to the bridge owners that Dixilyn had agreed to indemnify Crescent for the consequences of Crescent's own negligence.

A brief description of what transpired up to the time of the damage before stating what the District Court held will probably be helpful to the Court.

In order to navigate the drilling barge under the Natchez Bridge, Crescent planned to turn the flotilla around so that it would be headed up the river in order that the stern of the tug boats and the JULIE ANN would pass under the Natchez Bridge first. Above the bridge, Crescent's Captain Brechtel was to stop the flotilla completely, give the order to lower the legs to Dixilyn's personnel and hold the flotilla in its stopped position at a point well above the bridge until the necessary depth of the legs in the water had been obtained. Crescent's Captain Brechtel's navi-

gational plan called for the lowering of the legs of the JULIE ANN to a depth of fifty-five feet in the water and was to be done in two stages. The legs were first lowered to thirty-five feet at a distance approximately a mile to a mile and a quarter above the bridge. Crescent's Captain Brechtel did not lower the legs to the full fifty-five feet at this time, because of a rock shelf about fifteen hundred feet upstream from the Natchez Bridge which made out from the Mississippi shore, and he did not want to risk damage to the flotilla by taking it across this rock ledge with fifty-five feet of draft on the legs. The decision not to lower the legs to fifty-five feet at the time they were initially lowered to thirty-five feet was made by Crescent's Captain Brechtel as the navigator of the flotilla. After crossing this rock ledge, Crescent's Captain Brechtel planned to stop the flotilla completely and lower the legs to the desired fifty-five feet. As this would be an additional twenty feet that the legs would have to be lowered into the water, and as the legs lowered at a constant rate of approximately one foot per minute, this meant that Crescent's Captain Brechtel contemplated holding the flotilla completely stopped after crossing this rock ledge some fifteen hundred feet above the bridge a minimum of twenty minutes while the legs were lowered. After holding the flotilla in this position while the legs were lowered to the contemplated depth, once the desired depth on the legs had been obtained, Crescent's Captain Brechtel then planned to permit the barge to proceed down through the Natchez Bridge. Obviously the key to the successful consummation of this plan for navigating the drilling barge under the Natchez Bridge was the complete stopping of the flotilla and the holding of it in substantially a fixed position above the bridge for approximately twenty min-

utes while the last twenty feet of the legs on the JULIE ANN were lowered into the water. The tugs supplied by Crescent were never able to stop the flotilla after it crossed the rock ledge and the bridge was damaged because the flotilla reached the bridge before enough time had elapsed for the legs to be lowered the last twenty feet.

The District Court found as a fact that Crescent's navigational plan failed and the bridge was damaged solely because of the negligence of Crescent and the unseaworthiness of Crescent's Tug ORLEANS. The District Court found Crescent negligent in five particulars:

1. Because Crescent failed to supply tugs with sufficient horsepower to completely stop the tow and hold it in the water long enough for the legs on the drilling barge to be lowered to the depth necessary to clear the bridge. (R. 600; infra page 68).

2. Because Crescent furnished the Tug ORLEANS with a defective engine so that it was not able to exert full power because its engine failed above the bridge at the crucial moment. (R. 600, 601; infra, page 69).

(Note: While not expressly stated in the District Court's opinion, there can be no dispute as a matter of law the Tug ORLEANS was unseaworthy because of this defective engine.)

3. Because Crescent's Captain Brechtel did not completely stop the flotilla immediately after crossing the rock ledge so that the legs could be lowered to the contemplated depth. (R. 601; infra, page 69).

4. Because Crescent's Captain Brechtel did not make a test of the holding power of the tugs with the legs

lowered to the comtemplated depth well above the bridge before attempting to navigate the flotilla under the bridge. (R. 601; infra, page 69).

5. Because Crescent's Captin Brechtel failed to notify Dixilyn's employee at an earlier time to start lowering the legs. (R. 601; infra, page 69).

The District Court expressly found that Dixilyn was not negligent to any extent and fully performed its function of lowering the legs in connection with Crescent's unsuccessful attempt to navigate the flotilla under the Natchez Bridge.

Having found that it was solely the negligence of Crescent and the unseaworthiness of Crescent's Tug ORLEANS which caused this damage, the District Court then considered whether or not the contract required Dixilyn as owner of the craft towed to indemnify Crescent as the tower for the consequences of Crescent's own negligence. The District Court, following the rule which had been stated by the Court of Appeals below on eight separate occasions, held that the contract did not express in clear and definite terms that Dixilyn intended to indemnity Crescent for the consequence of Crescent's own negligence.[3]

Since the District Court held that the contract did not evidence the intention of the parties in these unequivocal

[3]The District Court cited and relied on **Batson-Cook Company v. Industrial Steel Erectors**, 257 F.2d 410 (C.A. 5, 1958), and **Standard Oil Company of Texas v. Wampler**, 218 F.2d 768, (C.A. 5, 1955) in both of which the Court of Appeals below had expressly held that indemnity agreements are strictly construed against the indemnitee and that contracts would not be so construed unless the indemnitor's obligation to protect the indemnitee from his own negligence was expressed in unequivocal terms.

terms, it did not reach the question of whether or not such a contract relieving Crescent as the tower of the barge of liability for its own negligence was invalid under the rule announced by this Court in the *Bisso*[4] and *Winding Gulf*[5] cases.

Upon Crescent's appeal from the judgment of the District Court, the Court of Appeals below reversed the District Court on the basis of the contractual agreement between the parties. In so doing, the Court of Appeals held:

> 1. That even though the language of the contract between the parties relating to indemnity was "doubtful and ambiguous" and even though an intention on the part of Dixilyn to indemnify Crescent was not stated in the contract in unequivocal terms as the Court of Appeals below had heretofore required, that by looking to the correspondence, conferences and circumstances surrounding the execution of the contract, it was the intention of the parties that Dixilyn indemnify Crescent for the consequences of Crescent's own negligence. This is exactly opposite to the result reached by the District Court.
>
> 2. Having concluded not from the terms of the contract itself, but from extraneous circumstances that Dixilyn as owner of the towed barge had agreed to indemnify the tower for the consequences of the tower's own negligence, the Court of Appeals below then held that such a contract was not controlled by

[4]**Bisso v. Inland Waterways Corporation,** 349 U.S. 85, 99 L.Ed. 911, 75 S.Ct. 629, 1955 A.M.C. 899 (1955).

[5]**Boston Metals Company v. SS WINDING GULF,** 349 U.S. 122, 99 L.Ed. 933, 75 S.Ct. 649, 1955 A.M.C. 927 (1955).

the rule announced by this Court in the *Bisso* and *Winding Gulf* cases that contracts relieving towers of liability for their negligence were invalid because contrary to public policy. The Court of Appeals below thus attempted to create an exception to this Court's public policy rule as announced in the *Bisso* and *Winding Gulf* cases.[6]

3. The Court of Appeals then considered another question not reached by the District Court with respect to the measure of damages to which Crescent might be entitled under the indemnity agreement. The Court of Appeals below again refused to follow one of its earlier decisions[7] and held that Crescent was entitled to reimbursement for the full amount of damages paid to the bridge rather than the damages actually sustained by Crescent which was limited solely to the cost of insurance then in effect protecting Crescent against any and all losses such as this.

REASONS FOR GRANTING THE WRIT

I.

The holding of the Court of Appeals that Dixilyn as owner of the towed drilling barge validly contracted to indemnify Crescent's tugs for all liability to third parties for Crescent's own negligence is directly in conflict with the decisions of this Court in:

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[6]**Bisso v. Inland Waterways Corporation,** 349 U.S. 85, 99 L.Ed. 911, 75 S.Ct. 629, 1955 A.M.C. 899 (1955); **Boston Metals Company v. SS WINDING GULF,** 349 U.S. 122, 92 L.Ed. 933, 75 S.Ct. 629, 1955 A.M.C. 927 (1955).

[7]**Standard Oil Company of Texas v. Wampler,** 218 F.2d 768 (C.A. 5, 1955).

Bisso v. Inland Waterways Corporation, 349 U.S. 85, 99 L. Ed. 911, 75 S. Ct. 629, 1955 A.M.C. 899 (1955)

and

Boston Metals Company v. SS WINDING GULF, 349 U.S. 122, 99 L. Ed. 933, 75 S. Ct. 649, 1955 A.M.C. 927 (1955).

In the landmark *Bisso* case, this Court specifically held that a contract releasing a tower from all liability for its negligence which resulted in damage to the tow itself was invalid because contrary to public policy. In so doing, this Court stated that because of "judicial history and cogent reasons in support of a rule outlawing such contracts we now, despite past uncertainty and difference among the circuits, accept this as the controlling rule."[8]

On the same day in the *Winding Gulf* case,[9] this Court made it perfectly plain that a contract relieving a towing tug of all liability for its negligent navigation was contrary to public policy not only insofar as damages to the tow was concerned, but also with respect to damages of third parties caused by the negligence of the towing tug.

In declaring that a towing tug could not contract away its liability for its own negligence, this Court made it perfectly clear that there were two main reasons for the creation and the application of this rule. It stated them thusly:

". . . (1) To discourage negligence by making wrongdoers pay damages, and

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[8]**Bisso v. Inland Waterways Corporation**, 349 U.S. 85, at page 90, 99 L.Ed. 911, at page 917, 75 S.Ct. 629, 1955 A.M.C. 899, at page 904 (1955).

[9]**Boston Metals Company v. SS WINDING GULF**, 349 U.S. 122, 99 L.Ed. 933, 75 S.Ct. 649, 1955 A.M.C. 927 (1955).

> (2) To protect those in need of goods or services from being overreached by others who have power to drive hard bargains."[10]

Notwithstanding this rule of law based on public policy, the Court of Appeals in the present case has created an exception to this public policy rule and in doing so relied primarily on some dictum contained in this Court's decision in *Southwestern Sugar & Molasses Company, Inc. v. River Terminals Corporation,* 360 U.S. 411, 3 L. Ed. 1334, 79 S. Ct. 1210 (1959), in which this Court had under consideration a clause relieving a tower of liability for its negligence which had been filed as a part of a tariff with the Interstate Commerce Commission. After holding that such a clause in a tariff filed with the Interstate Commerce Commission should not be declared invalid without the Interstate Commerce Commission having had an opportunity to express its views, this Court indicated that the rule of *Bisso* might call for modification where an effective regulatory scheme controlled the liabilities of tug and tow. This Court then stated:

> "If the peculiar hazards involved in towing a barge supplied by the shipper are great, and the methods of guarding against those hazards uncertain, it may be that in an area where Congress has not, expressly or by fair implication, declared for a particular result, the federal courts should creatively exercise their responsibility for the development of the law maritime to fashion a particularized rule to deal with particularized circumstances."[11]

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[10]**Bisso v. Inland Waterways Corporation,** 349 U.S. 85, at page 91, 99 L.Ed. 911, at page 918, 75 S.Ct. 629, 1955 A.M.C. 899, at page 905 (1955).

[11]**Southwestern Sugar & Molasses Company, Inc. v. River Terminals Corporation,** 360 U.S. 411, at page 419, 3 L.Ed. 1334, at page 1341, 79 S.Ct. 1210 (1959).

Apparently believing that this language meant that exceptions were to be made to the *Bisso* rule in certain circumstances, the Court of Appeals so held in this case when in fact the two conditions precedent to any such exception as stated by this Court in the *Southwestern Sugar & Molasses Company* case were not present. The two condition precedent to creating an exception to the *Bisso* rule as stated in the *Southwestern Sugar & Molasses* case were:

> 1. That the peculiar *hazards* involved in towing a barge supplied by the shipper *be great.*
>
> 2. That the *methods of guarding* against those great and peculiar hazards *be uncertain.*[12]

[12] In both of the other cases cited and relied on by the Court of Appeals below in support of the exception if created to this Court's **Bisso** rule, the hazards excepted met both these tests—in both the hazards were great and the method of guarding against them was not only uncertain but non-existent if the barges were to be towed at all.

In the decision rendered before **Bisso** by the Second Circuit, **North River Barge Line v. Chile S.S. Co.**, 213 F.2d 882 (1954), the great hazard was ice and the only method of guarding against it was not to tow the barge at all. Nevertheless, the tower did not seek to avoid its liability otherwise for its own negligent towage and the contract expressly provided only that the tower would not be liable for towing the barge in the ice. This is a far cry from the complete exoneration from liability for its own negligence which Crescent has been given by the Court of Appeals below in the present case notwithstanding this Court's rule to the contrary in **Bisso.**

Likewise, in the District Court case, **Chile Steamship Company v. The Justine McAllister,** S.D. N.Y., 168 F.Supp. 700 (1958), the great hazard was ice and there was in fact no method of guarding against the hazard of ice. Here again the tower assumed all liabilities except for damages due to ice and the contract specifically so provided.

Whatever exception to **Bisso** might be justified where there is no method of guarding against a hazard such as ice, is of no significance here where by the simple method of supplying tugs with sufficient horsepower to stop and control the tow, Crescent would have completely eliminated the hazard which resulted in the damage to the bridge.

Neither of these factors is present in the instant case, for while this offshore drilling barge may have been unusual in its characteristics because of its legs, and therefore may have presented a peculiar hazard[13] in navigating underneath the bridges on the Mississippi River, this hazard was not great, and certainly was not a hazard in which the method of guarding against it was uncertain. The hazard was not great because by a simple adjustment in the position of the legs by either raising or lowering them to a proper depth in the water all bridges could be navigated with safety. And the method of guarding against the hazard of these legs on this drilling barge striking a bridge was not uncertain. The method of guarding against this hazard, however peculiar it might have been, was both certain and simple indeed—Crescent simply had to supply tugs with sufficient horsepower to hold the drilling barge stationary in the river while the legs were lowered to the depth that would permit them to clear the bridges. Certainly there is nothing uncertain as to the method that should have been employed by Crescent to completely eliminate any danger of the drilling barge striking a bridge. Sufficient horsepower was all that was required, and as the District Court found, Crescent wholly failed in its contractual obligation to provide a sufficient amount of horsepower to guard against this hazard. By simply adding an additional tug or using tugs of greater horsepower than

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[13]Even that it was a peculiar hazard, however, is extremely doubtful for in every passage under a bridge by any tug and tow the risk and possibility of a collision with the bridge is an ever present hazard.

It can hardly be said that the hazard here is any more peculiar than that existing when a single river tow boat navigates 30 or 40 barges at one time through a bridge such as this or when one or more tugs navigate a large deep sea vessel without its own power under a bridge such as this.

those supplied, Crescent had the certain means of eliminating all possibility of an accident ever occurring such as is involved in this case.[14]

But this is not the only certain and simple method which Crescent had of eliminating this hazard, for by the simple expedient of testing the ability of the three tugs which it supplied to hold the drilling barge while the legs were lowered to the desired depth before it ever approached the bridge, Crescent could easily have ascertained that the three tugs it had supplied were not of sufficient horsepower to hold the barge while the legs were lowered. The District Court expressly held that Crescent negligently failed to make such a test above the bridge where there was adequate water for this purpose and where there would have been no danger of damage to anyone or anything in the process of making the test.

Instead of adopting these two certain and simple methods of guarding against the hazard of one of the drilling barge's legs coming in contact with the bridge, Crescent negligently failed to make any such test to determine the adequacy of the horsepower supplied and negligently supplied an inadequate amount of power to perform the towing contract which it undertook.

The very essence of the contract which Crescent made with Dixilyn was the supplying of sufficient power to perform the towing operation without damage to the drilling barge or to the bridges across the river. It not only negligently failed to employ these two certain and simple

[14]Crescent supplied three tugs with engines that had a total of 6,375 horsepower (TOLTEC with 3,975 horsepower, OUACHITA with 1,800 horsepower and ORLEANS with 600 horsepower). Before taking the drilling barge under the Baton Rouge Bridge further down river, Crescent added a fourth tug with an additional 1,500 horsepower.

methods of guarding against this particular hazard, but it was also negligent in supplying the Tug ORLEANS in an unseaworthy condition because of its defective engine which failed above the bridge at the crucial moment.

Rather than creating an exception to the *Bisso* rule when neither of the conditions precedent to such an exception as set out by this Court in *Southwestern Sugar & Molasses* are present, this is a classic case for the application of the public policy rule of *Bisso*, and particularly so because such a public policy rule was felt necessary by this Court primarily to discourage negligence by making wrongdoers pay damages in these days when "the dangers of modern machines makes it all the more necessary that negligence be discouraged."[15]

The negligence of Crescent in furnishing an unseaworthy tug, in supplying insufficient power, and in failing to make a test to determine if the power it had supplied was sufficient, is a flagrant, yes, almost willful disregard of the contractual obligations which it assumed as a matter of law when it agreed to tow the barge. Whatever the economic factors may be, and regardless of how many other towing concerns may have been interested in performing this towage for Dixilyn, the fact remains that the *Bisso* rule was clearly and plainly designed to discourage and do away with the very kind of negligence of which Crescent was guilty in this case, and Crescent's attempts to contract away its liability for its own negligence must be declared invalid as contrary to public policy.

In the offshore drilling operations off of the coast of Louisiana and Texas, there are literally hundreds and perhaps thousands of contracts for towing services of various

[15]**Bisso v. Inland Waterways Corporation**, 349 U.S. 85 at page 91, 99 L.Ed. 911, at page 918, 75 S.Ct. 629, 1955 A.M.C. 899, at page 905 (1955).

kinds in substantially all of which there is some form of an indemnity agreement or release tower's clause. Until the decision of the Court of Appeals below in this case, these clauses were invalid, but the Court below has now created great uncertainty in the law relating to towage contracts by creating an unwarranted exception to this Court's public policy rule of *Bisso*. It is respectfully submitted that where a rule of law is founded squarely and steadfastly on public policy as is true of the *Bisso* rule, that the exceptions to this rule must be few and far between and that any such exceptions should be expressly reviewed and approved by this Court. Particularly is such a review indicated in this case where neither of the conditions precedent to such a possible exception as stated by this Court in *Southwestern Sugar & Molasses* are present. The hazards were not great, and the method of guarding against the hazards were not uncertain, but simple indeed—Crescent simply had to supply sufficient power to control the drilling barge at all times. Certainly a tower such as Crescent here should not be permitted to contract away its liability for negligently failing to supply enough power to perform the very towing operations which were the essence of its contractual obligation.[16]

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[16] In this respect it is strikingly similar to the essence of the contract which this Court relied on to imply as a matter of law a duty on a stevedoring contractor to indemnify the shipowner for damages arising out of the failure of the stevedoring contractor to perform its stevedoring services in a reasonably safe and workmanlike manner. See **Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.**, 350 U.S. 124, at page 133, 100 L.Ed. 133, at page 142, 76 S.Ct. 232 (1956).

If the law implies indemnity as was done in **Ryan**, for even stronger reasons an exception to **Bisso** should not be made to permit a tower to contract away its liability where it has negligently failed to perform its duty which is also the very essence of the towing contract.

II.

The holding of the Court of Appeals that since the indemnity contract did not express plainly and unequivocally an intention that Dixilyn would indemnify Crescent for the consequences of Crescent's own negligence, but rather was doubtful or ambiguous on this point, that the Court would then look to the correspondence and meetings and circumstances leading up to the exection of the contract to ascertain the intention of the parties, is directly in conflict with *two* recent decisions of this Court and with *eight* previous decisions of the Court of Appeals below.

The two decisions of this Court are:

> *Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 3 L. Ed. 2d 820, 79 S. Ct. 766 (1959);
> *Boston Metals Co. v. THE WINDING GULF*, 349 U.S. 122, 99 L. Ed. 933, 75 S. Ct. 649 (1955).

Quoting the rule directly from THE WINDING GULF case, this Court stated in *Herd & Co.*:

> "Similarly, contracts purporting to grant immunity from, or limitation of, liability must be strictly construed . . . for they 'are not to be applied to alter familiar rules visiting liability upon a tort feasor for the consequences of his negligence, unless the clarity of the language used expresses such to be the understanding of the contracting parties.' "[17]

Prior to the present decision, what the law was on this point "not only generally, but . . . in the Fifth Circuit as well,"[18] had been plainly reaffirmed by the Court of

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[17] **Herd & Co. v. Krawill Machinery Corp.**, 359 U.S. 297, at page 305, 3 L.Ed. 820, at page 825, 79 S.Ct. 766 (1959).

[18] **Batson-Cook Company, Inc. v. Industrial Steel Erectors**, 257 F.2d 410, at page 412 (C.A. 5, 1958).

Appeals below only four short years ago when it said:

> ". . . that while it need not be done in any particular language or form, unless the intention is unequivocally expressed in the plainest of words, the law will consider that the parties did not undertake to indemnify one against the consequences of his own negligence."[19]

That such an intention to indemnify a party against its own negligence had to be unequivocally expressed in the contract itself was first enunciated by the Court of Appeals below in 1935,[20] was reaffirmed twice in 1950,[21] once in 1951,[22] once in 1953,[23] and twice in 1955,[24] prior to its decision in *Batson-Cook* in 1958 from which the rule has heretofore been quoted. When the language of the contract in this case is compared with the contractual language of those eight cases, it is abundantly clear that the written contract in this case does not meet the rule of those eight cases that the intention to indemnify Crescent against its own negligence must be unequivocally

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[19]**Batson-Cook Company, Inc. v. Industrial Steel Erectors**, 257 F.2d 410, at page 412.

[20]**Southern Bell Telephone & Telegraph Co. v. Mayor and Board of Aldermen of City of Meridian, Mississippi**, 71 F.2d 983 (C.A. 5, 1935).

[21]**Martin v. American Optical Company**, 184 F.2d 528 (C.A. 5, 1950); **Halliburton Oil Well Cementing Co. v. Faulk**, 180 F.2d 79 (C.A. 5, 1950).

[22]**W. C. Shepherd Co. v. Royal Indemnity Co.**, 192 F.2d 710 (C.A. 5, 1951).

[23]**Thomas v. Atlantic Coastline Railroad Company**, 201 F.2d 167 (C.A. 5, 1953).

[24]**Standard Oil Company of Texas v. Wampler**, 213 F.2d 768 (C.A. 5, 1955); **Alabama Great Southern Railroad Company v. Louisville & Nashville Company**, 224 F.2d 1 (C.A. 5, 1955).

expressed in the plainest of terms. The only thing in writing evidencing any intention of Dixilyn to indemnify Crescent for any purpose in this case is contained in the following language:

> "It is particularly understood and agreed that you are authorized to and by this agreement do release and relieve us (Crescent) from any liability for account of your underwriters and that any damage claims urged by third parties, as well as any claim which may be urged by virtue of damage to the drilling rig in the course of the towage shall be for your account and the account of your underwriters." (Parenthetical expression added)[25]

Realizing that this language could not meet the unequivocal terms required by its eight previous decisions,[26]

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[25]All of the contract which was in writing in this case is quoted in the opinion of the Court of Appeals and consists of Crescent's letter of December 23, 1957 with the sentence eliminated as shown in the Court's opinion. See page 42, infra. The earlier letter from Crescent of December 19, 1957, with its attached Tower's Release Clause was rejected by Dixilyn.

[26]The contractual language in this case purported to **"release and relieve"** Crescent **"from any liability"** and from **"any damage claims urged by third parties."**

A brief look at the contractual language construed by the Court of Appeals in these eight earlier cases as not being sufficiently clear to require one party to indemnify another party for the consequences of its own negligence will quickly demonstrate why the Court of Appeals below had to make such a startling reversal in its approach to these indemnity contracts if it was to reach the result it did in this case:

1. In **Batson-Cook**, the indemnity clause provided for indemnity against **"any and all losses"** and **"to defend any suit"** and **"to pay all damages"**. The Court of Appeals below held that this language was not sufficiently clear to show the intent of the indemnitor to indemnify the indemnitee against losses arising out of the indemnitee's own negligence and expressly said that the word "all" did not include lia-

the Court of Appeals below sought to avoid the rule of these eight decisions by stating that the holdings of those eight cases simply meant the failure to refer specifically to

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bilities arising out of the indemnitee's own negligence. 257 F.2d 410 (C.A. 5, 1958).

2. In the **Wampler** case, the language employed was against "any" loss, and it was held that it failed to meet the requirement of the law that an agreement to indemnify or insure a party against its own negligence had to be expressed in unequivocal terms. 218 F.2d 768 (C.A. 5, 1955).

3. In the **Shepherd** case, the language employed in the contract was to save harmless the surety from **"all costs, expense, loss or damage"**, and to repay the surety **"all monies expended"** under the contract. The Court of Appeals held that this language could not be construed to indemnify the surety against losses resulting from its own wrongdoing. 192 F.2d 710 (C.A. 5, 1951).

4. In the **Martin** case, the contract provided that the lessor release the lessee from **"any and all damages"**. The Court of Appeals below held that this language did not require the lessee to indemnify the lessor against the lessor's own negligence, since there was no unequivocal expression of such intention. 184 F.2d 528 (C.A. 5, 1950).

5. In the **Halliburton Oil Well** case, the contract provided that the indemnitee **"shall not be responsible for damages or losses of any kind whatsoever . . . . whether resulting from the acts or omissions"** of the indemnitee. The Court of Appeals below held this language was not sufficient to require the indemnitor to pay for the indemnitee's negligence because such obligation had not been expressed in the contract in "unequivocal terms." 180 F.2d 79, at page 81 (C.A. 5, 1950).

6. In the **Southern Bell Telephone Company** case, the indemnitor assumed **"all liabilities"** and agreed to indemnify the indemnitee against **"any and all loss or damage"**. In holding this language not sufficiently clear to require the indemnitor to pay for the indemnitee's negligence the Court of Appeals below said:

> "It is well settled that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting to him through his own negligent acts, where such intention is not expressed in unequivocal terms." 74 F.2d 983, at page 984 (C.A. 5, 1935).

7. In the **Alabama Great Southern Railroad Company** case, the contract provided for indemnity against **"any loss**

negligence in an indemnity agreement was only some evidence of an intention not to indemnify against such losses. In the present case, the Court of Appeals below thus took the absence of an expression in unequivocal terms simply as one of the factors to be considered in determining the intent of the parties to a contract of indemnity, and proceeded to create for the Fifth Circuit an entirely new rule—that if an indemnity agreement does not cover the indemnitee's negligence plainly and unequivocally as had previously been required by that Court, that the Court would then consider the negotiations between the parties, the correspondence and other circumstances surrounding the consummation of the contract in an attempt to ascertain if the parties intended to do that which they did not say. What a tremendous and fantastic and unjustified reversal of a well-established rule of law this was!

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in whatever manner the same may be caused or occasioned, whether by or through the negligence" of the indemnitee "or otherwise". The Court of Appeals below held that this specific language although it referred to negligence was not sufficiently clear to cover "all losses" but was only sufficiently clear to require the indemnitor to pay for the indemnitee's simple negligence, and this Court expressly held that this language "could not properly be construed as intended to extend, or extending, to damage occasioned by willful conduct or wanton negligence" on the part of the indemnitee. 224 F.2d 1, at page 4 (C.A. 5, 1955).

8. In the **Thomas** case, the indemnity clause in the contract provided that the lessor would be indemnified against **"any and all" claims "whether the same is the result of fire caused by negligent emission of sparks from the locomotive engines of lessor, or otherwise, however resulting."** The Court of Appeals below also held in this case that this language was sufficiently clear to cover only the simple negligence of the lessor, but was not sufficiently clear or explicit to evidence an intention that the lessee pay for the claims resulting from the lessor's willful or wanton negligence. 201 F.2d 167 (C.A. 5, 1953).

The result is all the more shocking and inexplicable when two of the same panel of three judges[27] who decided the present case had only fourteen days before expressly stated "the general rule that a contract will not be construed to provide for indemnification of the indemnitee for losses due to his own neglect, unless the intention to do so is expressed in unequivocal terms."[28] Thus did the same panel of Circuit Judges reaffirm the general rule enunciated by the eight previous decisions of this Court. Yet in the present case the same Circuit Judges hold that if the intention to indemnify is not in fact expressed in the unequivocal terms in the contract, then the Court will examine extraneous evidence in an attempt to determine whether the parties had actually intended to do that which they did not express in the unequivocal terms required by this Court's earlier decisions.

It is impossible to understand how the same panel of Judges sitting on the same Court can in the space of fourteen days reaffirm the general rule and then completely emasculate it by saying that if the parties do not comply with the rule, the Court will consider extraneous circumstances to see if, in fact, the parties intended their silence to be equivalent to what the Court had said so many times before had to be expressed in unequivocal terms in the contract.

What an incongruous and chaotic result this is! It is respectfully submitted that the rule announced by the Court of Appeals below in the present case which requires a Court to look into the negotiations, correspondence, etc.

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[27]Chief Judge Tuttle and Circuit Judge Wisdom. Circuit Judge Rives who wrote the opinion in the present case dissented but on other grounds.

[28]**Halliburton Company v. Norton Drilling Company**, 302 F.2d 431, at page 436 (April 25, 1962).

leading up to the execution of an indemnity contract, in an effort to determine whether one party agreed to indemnify another party for its own negligence, is unsound, unjust, impractical and fosters great uncertainnty in the interpretation of contracts which leads inevitably to endless litigation in an attempt to ascertain the intention of the parties which should have been plainly stated in the contract itself.

The sound administration of justice requires that when the purpose of a contract is to impose the extraordinary liability of the indemnitee's negligence on the indemnitor, that this purpose and intention be spelled out in unmistakable terms in the contract itself. It is only by such a requirement that contracting parties, their attorneys and the Courts can know in situations such as this what unusual liabilities are being assumed, if any, by the various parties.

If an exception is to be created to the *Bisso* rule that a towing company cannot contract away its liability for negligence, it is respectfully submitted that contracting parties in the position of Dixilyn in this case are at least entitled to the protection of the rule which requires that contracts specifically provide in the plainest of language that the towed barge is assuming the tower's liability for the tower's negligence or the unseaworthiness of the tower's vessels. Certainly this is not too much to ask of a party who drafts the contract such as Crescent did in this case. The need for this to be plainly expressed is further emphasized when it is remembered that the basic rule of *Bisso* makes such provisions contrary to public policy and only exceptional circumstances may possibly create an exception to this public policy rule. Clearly if the liability is one that cannot be passed on unless an ex-

ception to the public policy rule of *Bisso* is made, it is all the more reason why such liability for negligence should not be passed from one party to another without the written contract expressing it in the plainest of terms.

III.

The holding of the Court of Appeals below that the contract did not have to provide in unequivocal terms that the drilling barge agreed to indemnify the towing tugs for the consequences of the tugs' own negligence is directly in conflict with the following decisions of other Courts of Appeals:

First Circuit:

Turner Construction Company v. W. J. Halloran Steel Erection Co., 240 F. 2d 441 (1957).

Second Circuit:

Mostyn v. Delaware, L. & W. R. Co., 160 F. 2d 15 (1947), cert. denied 332 U.S. 700, 92 L. Ed. 318, 68 S. Ct. 82 (1947).

Miller v. Pennsylvania Railroad Company, 236 F. 2d 295 (1956).

Seventh Circuit:

Chicago & N.W. Ry. Co. v. Chicago Packaged Fuel Company, 195 F. 2d 467 (1952), cert. denied 344 U.S. 832, 97 L. Ed. 648, 73 S. Ct. 39 (1952).

Eighth Circuit:

Ocean Accident & Guarantee Corp. v. Jansen, 203 F. 2d 682 (1953).

Ninth Circuit:

Wallace v. U. S., 18 F. 2d 20 (1927).

All of the above cases expressly hold that before a contract will be construed to require the indemnitor to indemnify the indemnitee for the consequences of the indemnitee's own negligence, that such an intention must be stated in unequivocal terms in the contract itself.

IV.

The Court of Appeals construed the contract in this case in complete and utter disregard of two well-established rules of law in interpreting indemnity clauses in contracts. These two rules which are so well settled that the citation of authority is unnecessary, are:

1. That a contract generally, and specifically a contract to indemnify, is strictly construed against the party who drafts it.

2. That a contract of indemnity, other than an insurance contract, is to be strictly construed in favor of the indemnitor.

Without dispute the language employed in the letter constituting the contract in this case is that of Crescent as supplier of the tugs and, in fact, was language drafted by its own skilled admiralty counsel with full knowledge of the eight previous decisions of the Court of Appeals below which had expressly held that to pass on the unusual liability of the tug's negligence to its tow that the contract had to express it in the plainest of language. Rather than strictly construing the contract drafted by Crescent's own admiralty counsel, the Court of Appeals does not construe the language at all, but holds that the language used by Crescent's counsel is not what the law required, and is in fact doubtful and ambiguous as to the intention

of the parties. Instead of applying the general rule that no indemnification was intended because of this doubt and ambiguity, the Court of Appeals below proceeds to look to extraneous evidence completely outside the contract in an attempt to determine the intention of the parties. It is impossible to imagine a more liberal construction of a contract in favor of the party who drafted it rather than against it as the law requires than has been made by the Court of Appeals in this case.

But the error of the Court of Appeals below does not stop here, but rather it is compounded by its refusal to follow still another tenet of contractual interpretation, a rule that it had firmly reiterated itself on five separate occasions since 1947. This is the rule of contractual construction of indemnity agreements that provides that they must be construed strictly in favor of the indemnitor, in this case the drilling barge being towed. In 1947 the Court of Appeals below stated this rule thusly:

> "On the other hand, it is certainly the general rule, that, where the indemnity is not contracted for from an insurance company whose business is to furnish indemnity for a premium and where indemnity is the principal purpose of the contract; but from one not in the indemnity business, and as an incident of a contract whose main purpose is something else, such as a sub-construction contract, the indemnity provision is construed strictly in favor of the indemnitor."[29]

On four subsequent occasions, the Court below has reaffirmed this rule of construction of indemnity contracts:

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[29]**Employers Casualty Company v. Howard P. Foley Company**, 158 F.2d 363, at page 364 (C.A. 5, 1947).

Halliburton Oil Well Cementing Company v. Paulk, 180 F. 2d 79 (C.A. 5, 1950)[30]

Martin v. American Optical Company, 184 F. 2d 528 (C.A. 5, 1950)[31]

Thomas v. Atlantic Coast Line Railway Company, 201 F. 2d 167 (C.A. 5, 1953)[32]

Standard Oil Company of Texas v. Wampler, 218 F. 2d 768 (C.A. 5, 1955)[33]

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[30]The Court said in part:

"In considering this claim of indemnity we must bear in mind the rule that indemnity agreements are strictly construed against him who claims to be an indemnitee. . . . This is particularly true where the result would be to indemnify against one's own negligence, and it will not be so construed unless such obligation is expressed in unequivocal terms." 180 F.2d 79, at page 84 (C.A. 5, 1950).

[31]The Court stated:

"This Court has had recent occasion to point to the strictness with which indemnity provisions are construed in favor of the indemnitor." 184 F. 2d 528, at page 529 (C.A. 5, 1950).

[32]The Court reiterated its earlier holding in **Employers Casualty Company v. Foley**, 158 F.2d 363 (C.A. 5, 1947), in almost identical language:

"It is the general rule that where the indemnity is not contracted for from an insurance company whose business it is to furnish indemnity for a premium under a contract, but is from one not in the indemnity business and is an incident of a contract whose main purpose is something else, the indemnity provision is construed strictly in favor of the indemnitor." 201 F.2d 167, at page 169 (C.A. 5, 1953).

[33]The Court stated in part, as follows:

"On briefs Appellants 'recognized the rule that indemnity agreements are strictly construed against him who claims to be an indemnitee, and that is particularly true where the result would be to indemnify against one's own negligence, and that it will not be so construed unless such obligation is expressed in unequivocal terms.' But, Appellants say, 'the intention of the party to indemnify against the indemnitee's negligence need not be expressly stated in the contract pro-

Contrary to the rule it had expressly stated on no less than five separate occasions since 1947, the Court of Appeals below not only did not strictly construe the indemnity provisions in the contract in favor of the indemnitor (the vessel being towed), but in fact did not construe the indemnity provisions of the contract at all, but rather attempted to ascertain the intention of the parties by looking to the conferences, correspondence and other surrounding circumstances connected with the contractual agreement. This it did without any reference whatsoever to the rule it had so often stated that a contract of indemnity had to be construed strictly in favor of the indemnitor.

When these two tenets of contractual construction, which are particularly appropriate when an unusual liability such as the negligence of the indemnitee is sought to be passed on to another, are applied to the contractual language used in this case by Crescent's own counsel, the error of the Court of Appeals below is as plain and unequivocal as the language it had heretofore required in an indemnity contract before it would pass on the liability of an indemnitee for its own negligence to an indemnitor.

V.

The holding of the Court of Appeals with respect to the amount of damages to which Crescent is entitled if Dixilyn is ultimately held liable to indemnify Crescent for Crescent's own negligence, is in direct conflict with that same Court's earlier decision in *Standard Oil Com-*

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vided otherwise clearly appears in the language used.' There is nothing wrong with Appellants' statement of the rules. The difficulty is that, construing the contract strictly, the indemnity claim is not expressed in unequivocal terms." 218 F.2d 768, at page 770 (C.A. 5, 1955).

pany of Texas v. Wampler, 218 F. 2d 768 (C.A. 5, 1955). In the present case the Court of Appeals held that Dixilyn was liable to Crescent for the full amount of damages paid by it to the owners of the bridge, whereas its previous holding in the *Wampler* case under identical circumstances required it to hold that Crescent's damages were only the premiums paid by Crescent for the insurance which covered the sums it had to pay in damages. While the Court of Appeals attempts to distinguish the *Wampler* case from the present case, it is a distinction without substance, for it is undisputed that Crescent's own regular insurance policies covered the damages it paid to the bridge and Crescent itself sustained no loss whatsoever other than the premiums which it had paid for the insurance for its tugs during the course of this operation.

It is respectfully submitted that an authoritative determination from this Court as to what is the proper measure of damages under these circumstances is urgently needed. The question here is not what will make Crescent and its insurance underwriters whole if Dixilyn must indemnify Crescent, but what sum of money is necessary to make Crescent alone whole for the damages paid to the bridge.

VI.

The questions presented on this application, and particularly the question whether an exception to the public policy rule of *Bisso* that contracts relieving a tower from liability for its own negligence are invalid, are of tremendous national importance. While this statement could have been made some ten or fifteen years ago purely on

the basis of the large amount of transportation upon the inland waterways and inland rivers of the United States, it is of even more significance and importance now with the vast amount of offshore drilling operations now taking place not only off the States bordering the Gulf of Mexico, but off the Pacific and Atlantic Coast States as well. In these offshore operations, the need for towing drilling rigs such as the one involved in this case as well as all other types of vessels from one offshore location to another is vast indeed. Notwithstanding the *Bisso* rule, as was true in this case, the towing companies almost uniformly and consistently place some sort of indemnity provision in the contract purporting to relieve the towing tugs of all or a part of the tug's liability for its own negligence.

Under these circumstances, since this is not towage which is in any way subject to a regulatory scheme of the Interstate Commerce Commission, it is most important that this vast new arena of maritime operations know as promptly as possible with as much definiteness as possible the extent to which, if any, this Court's public policy rule of *Bisso* is to be relaxed by having exceptions to its applicability created as was done by the Court of Appeals below.

The uncertainty created in the interpretation of these indemnity contracts by the Court of Appeals below, is large indeed, an uncertainty that will undoubtedly lead to much litigation, particularly from the towing operations going on in the offshore drilling operations adjacent to the several states.

In speaking of the clause exempting the tug from liability for its own negligence in the *Southwestern Sugar*

Molasses Company case and the issue presented in that case as to whether or not that clause was valid or invalid under the *Bisso* rule, this Court stated:

> "The issue is one of importance in the development of the law maritime, as to which we have large responsibilities, constitutionally conferred; it is squarely presented on the record before us; and the exigences of this litigation clearly call for its resolution at this stage."[34]

Precisely the same statement applies with even greater force to the issues presented here—is an exception to the *Bisso* rule to be created, and if so, must the indemnity contract provide for such an exception, in plain and unequivocal terms? It is submitted that not only the exigencies of the present litigation, but the exigencies of the development of the law maritime require this Court to consider these important issues. Only with an authoritative decision of this Court can the limit to which the *Bisso* rule is to be relaxed, if at all, be determined, and the sooner this question is settled, the quicker the maritime law in this area will have its course charted in the proper channel, and on smooth seas which will permit the towing industry, both tug and tow alike, to proceed with full speed ahead with each clearly understanding its rights and liabilities.

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[34] **Southwestern Sugar & Molasses Company v. River Terminals Corp.**, 360 U.S. 411, at page 415, 3 L.Ed. 1334, at page 1339, 79 S. Ct. 1210 (1959).

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

E. D. VICKERY,
Attorney for Petitioner

Of Counsel:

ROYSTON, RAYZOR & COOK
877 San Jacinto Building
Houston 2, Texas

August 3, 1962

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Petition for Writ of Certiorari have been served on the attorneys for the Respondent, Mr. Charles Kohlmeyer, Jr., Leml & Kelleher, 1836 National Bank of Commerce Building, New Orleans 12, Louisiana and on Messrs. Brunini, Everett, Grantham & Quin, First National Bank Building, Vicksburg, Mississippi by depositing the same in the United States Post Office with First Class Air Mail postage prepaid to the addresses shown above on this the day of August, 1962.

Of Royston, Rayzor & Cook

APPENDIX "A"

JUDGMENT.

Extract from the Minutes of May 9, 1962

CRESCENT TOWING & SALVAGE COMPANY

No. 19148 versus

DIXILYN DRILLING COMPANY

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for the entry of a judgment consistent with the opinion of this Court;

It is further ordered, adjudged and decreed that the appellee, Dixilyn Drilling Corporation be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19148

CRESCENT TOWING & SALVAGE COMPANY,
Appellant,

versus

DIXILYN DRILLING CORPORATION,
Appellee.

Appeal from the United States District Court for the Southern District of Mississippi

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(May 9, 1962)

Before TUTTLE, Chief Judge, and RIVES and WISDOM, Circuit Judges.

RIVES, Circuit Judge: The appellant (Crescent) and the appellee (Dixilyn) were respondents to a libel filed by the Mississippi State Highway Commission, the City of Natchez, and the Highway Department of the State of Louisiana for $41,363.24 damages sustained by the Natchez-Vidalia Bridge when Dixilyn's Julie Ann, an offshore drilling barge, collided with the underside of the bridge. The Julie Ann was being towed down the Mississippi River by Crescent pursuant to its contract with Dixilyn. Crescent and Dixilyn jointly paid the amount of the libelants' claim

under a stipulation approved by the court, which provided in part that "the libelees, as between themselves, may litigate to a final conclusion all questions of negligence, liability, contribution, indemnity and ultimate responsibility on the part of each or both of the libelees." After a full trial on the merits, the district court entered a final decree holding Crescent solely at fault and liable to repay to Dixilyn its half of the satisfied claim with interest and costs.[1]

The district court found Crescent at fault for not furnishing enough power to hold the Julie Ann while her legs were lowered sufficiently to clear the underside of the bridge, and that Crescent's Tug Orleans had an engine failure which caused or contributed to the lack of sufficient power. It further found that Crescent's Captain Brechtel was guilty of negligence in failing to make an earlier test of the holding power of the tugs with the legs lowered to the required depth, in not causing the Julie Ann to be brought to a complete stop for the lowering of her legs, and in failing to notify Dixilyn's employee Hughes at an earlier time to start the lowering of the legs. Those findings are vigorously attacked by Crescent as clearly erroneous, and Crescent insists that the collision was caused by a misunderstanding of the Dixilyn personnel aboard Julie Ann as to the operation of her legs, and by their failure properly to call the draft of the legs, thereby leading Captain Brechtel to the belief that the legs would clear the underside of the bridge.

A review of the district court's findings of fact would confront us with an extremely difficult decision. Instead, we examine first the towage contract between Dixilyn and

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[1]The opinion of the district court is reported as Mississippi Highway Commission, et al. v. Dixilyn Drilling Corporation, et al. S.D. Miss., 198 F.Supp. 788.

Crescent. If that contract validly shifted liability for the collision damages to Dixilyn or its insurer, whether or not Crescent was negligent, the fact findings as to negligence are immaterial.

The facts necessary for our consideration of the towage contract are not in substantial dispute, and are restated largely from the briefs of the parties.

The Julie Ann, constructed at the LeTourneau plant at Vicksburg, is a self-contained, submersible type drilling rig. She is 193 feet long, 151 feet wide, and has a displacement of 2500 tons. She is triangular in shape, with legs of open truss steel frame construction 175 feet long set on each corner of the triangle. Approximately 30 feet of the legs had not been installed at the time of the collision. The lower end of each leg consists of spud tanks or feet 35 feet in diameter and about 35 feet in height. The legs provide a tripod on which the hull of the barge can be raised or lowered for drilling operations or for navigational purposes. The legs are operated from a control room situated above the quarters. They are lowered and retracted by three 60 cycle motors powered by three generators, any one of which is capable of lowering or retracting all three legs simultaneously. The legs are controlled by three levers, all of which can be manipulated so that each leg can be raised or lowered by itself or with one or both of the other legs.

The barge hull itself is 20 feet in depth (from main deck to bottom), and at the time of the collision the hull afloat was drawing approximately 13 feet. Below the main deck is a machinery deck containing a complex of equipment and tanks necessary for drilling operations, including mud tanks, water tanks, and fuel tanks. On the main deck are located draw works, pipe racks and anchor winches. Two story living quarters are situated above the main deck,

completely equipped as spacious and comfortable accommodations for 45 men, all air-conditioned and equipped with a modern galley, laundry and recreation lounge. The rig is a complete self-contained unit, capable of drilling in more than 100 feet of water, and includes in her equipment slush pumps, a Schlumberger unit, cement unit, mud lab, water evaporator, mud pits and mixers, jets and guns, six diesel engines, and six electric generators.

The Natchez-Vidalia bridge is a fixed highway bridge over the Mississippi River. The lowest member of the bridge is 142.9 feet above mean sea level. The surface of the river at the bridge is 17.28 feet above mean sea level at zero on the Natchez gauge. On December 27, 1957, the date of the collision, the Natchez gauge reading was 33.2 feet, so that there was a clearance of 92.4 feet between the surface of the water and the lowest steel on the bottom side of the bridge. The legs of the rig being 143 feet long, they had to be lowered so that at least 51 feet were below the water in order for the rig safely to clear under the bridge. The legs could not be lowered to a depth that would cause them to foul on the river bottom during the approach to the bridge.

The channel of the river (the deepest portion, in which safe navigation is afforded) approaching the bridge is no less than 1200 feet wide for a substantial distance above it. The contour of the bottom, however, is not level a short distance above the bridge, there being a ledge or bar less than 55 feet below the surface about 2500 feet above the bridge. Accordingly, until the flotilla passed that point, it was impractical for the legs to have been lowered more than 35 feet. All of these facts were generally known, although, of course, the exact level of the water and the exact conditions which would be encountered on the day that

the proposed movement would take place could not be foreseen in advance.

The Julie Ann was scheduled for departure from the builder's yard at Vicksburg for the day after Christmas. Upon hearing that the rig was nearing completion, Crescent solicited the business of towing her to New Orleans, and a letter of solicitation was written. Whether due to this solicitation or otherwise, Dixilyn contacted Crescent in mid-December and suggested a meeting to negotiate a towage contract. A meeting was held at Dixilyn's office in New Orleans in mid-December, attended by Messrs. Tidwell, Boring and Brigham, corporate officers of Dixilyn, Messrs. Wood and Blakely, whose capacity will be hereafter adverted to, and Messrs. Apgar, Smith and Lanman of Crescent. (Mr. Lanman died prior to the trial.) At this meeting, there was a discussion of the general characteristics of the rig and of the timing of the movement, and it was tentatively agreed that Crescent would undertake the towage. Mr. Wood specified that he desired Captain Brechtel to be in charge of the tow, because he had brought one or more rigs down the river on prior occasions. Crescent stated that it proposed to use Captain Brechtel with its small Tug Orleans and two upriver push boats, the Toltec and the Ouachita, if those vessels were available. The navigation of the flotilla was to be under the command of Crescent's pilot, Captain Brechtel.

The Toltec is a triple screw, 3975 horsepower push boat, 130 feet long by 30 feet wide. It was only six months old at the time of the collision and was the sixth most powerful towboat then running on the Mississippi River. The Ouachita is a twin screw, 1800 horsepower push boat, 90 feet long by 26 feet wide. The Orleans is a single screw tug of 700 horsepower, 100 feet long by 26 feet wide.

The exact role of Mr. Wood does not appear by the evidence. Mr. Wood died before the case was tried, and Mr. Blakely was not called to testify. Wood, however, was the president and owner of a marine surveying company in New Orleans and had had substantial experience in the engineering and moving of submersible drilling rigs comparable to Julie Ann. Blakely was one of his staff. Evidently they represented Dixilyn in this instance, or Dixilyn's underwriters, for they were at the meeting and participated in the conference and did not represent or have any connection with Crescent.

The district court found that the question of a provision in the towage agreement releasing Crescent of all liability was not determined at that meeting, and that nothing definite was agreed on other than that Crescent would undertake the towage and would place it in charge of Captain Brechtel.

Following the discussion at the meeting, Crescent's vice president, Mr. Apgar, after consulting with its admiralty counsel, Mr. Kohlmeyer, wrote a letter to Dixilyn as follows:

"December 19, 1957

"Dixilyn Drilling Corp.
Saratoga Building
New Orleans, Louisiana.

"Attention: Mr. H. Brighan
Executive Vice President

"Subj: 'JULIE ANN' From Vicksburg
December 26th, 1957

"Gentlemen:

"We wish to confirm our recent conversation including Mr. M. O. Boring, Jr. and Mr. Mike

Smith, in which we discussed the towing of the 'JULIE ANN' from Vicksburg to our Fleet Landing in the New Orleans harbor.

"We understand that the 'JULIE ANN' will be ready to leave Vicksburg the morning of December 26th and we expect to be in Vicksburg ready to move her at that time; we contemplate using two river pushboats (towboats) of substantial horsepower and one tugboat. For the trip from New Orleans to her offshore location, seagoing tugboats will be used.

"This tow will be performed by Crescent subject to towage release clause, copy of which is attached and is part of our agreement with you; it being mutually understood and agreed that in consideration of including this clause lower rates prevail. It is also necessary that we (Crescent Towing & Salvage Co., Inc.) be included in the 'JULIE ANN' hull and P & I Insurance coverage and we will appreciate receiving a letter or telegram from your underwriters or brokers to this effect as soon as possible.

"We will continue to keep in touch with your office and know that you will advise us if there is any change in the anticipated readiness of the rig at Vicksburg .We appreciate very much your calling upon us to tow the 'JULIE ANN.'

"Very truly yours,

"CRESCENT TOWING & SALVAGE CO., INC.

"By /s/ Warren C. Apgar
"VICE PRESIDENT.

WCA:m
Encl. (1)

cc - Mr. Pic
Rate files

"TOWER'S RELEASE CLAUSE

"All towage will be performed solely at the risk of the craft towed and its cargo, including the risk of negligence of the master, pilot and crew of the towing craft and our employees, agents and representatives, all of whom in respect to the towage shall become and be the servants of the craft towed and its owners and operators; provided that nothing herein contained shall be construed as making the craft towed, its owners or operators, liable or responsible for loss of or damage to the towing craft or property owned by third parties or for loss of life or personal injury for which the craft towed, its owners or operators, would not otherwise be liable or responsible. Neither we nor the towing craft nor its owners or operators shall be liable, and the craft towed and its owners and operators shall hold us and the towing craft and its owners and operators harmless from any liability, for any loss of or damage to the craft towed and its cargo from any cause whatsoever, including loss or damage caused by negligence of the master, pilot and crew of the towing craft and our employees, agents and representative. We reserve the right to tow all vessels singly or with other craft and to change craft towed from one to another tow as frequently as we may find it convenient to do so. Release of craft to be towed to any vessel owned or used by us for towage shall be conclusive evidence of the acceptance of these conditions."

The letter was referred by Dixilyn to representatives of the underwriters of the barge, and they were dissatisfied with the "Tower's Release Clause." Mr. Tidwell of Dixilyn called Mr. Apgar of Crescent and told him simply that the

clause was not acceptable. Crescent submitted to Dixilyn a second letter, one sentence of which, as indicated, was found objectionable:

"December 23, 1957

"Dixilyn Drilling Corporation
Saratoga Building
New Orleans, Louisiana.

"Gentlemen:

"With further reference to our undertaking to tow your drilling barge JULIE ANN from Vicksburg to our Fleet Landing in New Orleans and then down the Mississippi River into the Gulf, we confirm that the following additional clause shall be included in the contract as part of the consideration for our undertaking the towage:

~~"You agree to indemnify us, our tugs and equipment and all other parties taking part in the towage and their equipment and our and their underwriters of and from any and all liability or claim which may arise out of the towage of the drilling barge.~~ It is particularly understood and agreed that you are authorized to and by this agreement do release and relieve us from any liability for account of your underwriters and that any damage claims urged by third parties as well as any claim which may be urged by virtue of damage to the drilling rig in the course of the towage shall be for your account and account of your underwriters.

"It is further understood that the amount of the insurance protection which you have in force equals the value of the hull of the barge as to hull insurance and amounts to four million dollars as to third party claims.

"If the foregoing meets with your approval and represents this portion of our agreement, please sign and return to us the attached three copies of this letter, retaining the original and the other copy for your files.

"Very truly yours,

"CRESCENT TOWING & SALVAGE CO., INC.,
"BY /s/ Warren C. Apgar
"VICE PRESIDENT.

WCA:m

"APPROVED:
"Dixilyn Drilling Corporation
By: _____ (NOT SIGNED.)"

The circumstances under which the letter was redrafted with the objectionable clause omitted are thus stated in the testimony of Mr. Tidwell of Dixilyn:

"Well, when I received the letter, I didn't understand it, so I had been advised and been discussing the matter with Mr. Griffin and Mr. Stenz, who are with Southern Marine and Aviation Underwriters, so I called them when I received this letter and read it to them on the phone and asked them if it was all right for me to sign it or normal precedure for me to sign it. So they had me to read it again and studied it and talked about it. So there was one sentence in there they said they wouldn't like to sign at all with that sentence in it.

"They said they wouldn't like for me to sign that letter at all with that one sentence in it and said,

in fact, all the letter was objectionable, that they wouldn't like for me to sign it at all, but I could go ahead and sign it with that one sentence if it was stricken out, and said even though the rest of the letter—'We don't like it; it's been proven that it's not legal by a prior case in court; that it's not a legal document, but if they insist on you signing it, it will be all right to go ahead but we don't like it, but you can sign the rest of it.' So I called Mr. Apgar and told him I couldn't sign it at all with that one sentence in it; that I would sign it if they would strike that sentence out. So he said, 'Well, we'll re-write the letter verbatim, just leaving out that sentence.' And he wanted to know if I would sign it if they would do that. He did; sent me another letter, and I called Mr. Griffin and Stenz and read that letter to them and told them it was exactly the same except that one sentence was left out, and they advised me to go ahead and sign it. That is why I signed it on their advice, because I felt like I needed some help because I didn't understand it. But I did sign it, not understanding, on their advice."

As indicated, the letter was redrafted with the objectionable sentence omitted and, as thus redrafted, was signed by Mr. Apgar for Crescent and by Mr. Tidwell for Dixilyn.[2]

As to whether the towage contract should be construed to shift to Dixilyn liability for collision damages in any event, including damages due to negligence of Crescent, the district court held:

"The second question presented by this record for determination is whether or not the Dixilyn

[2]The consideration and other details were agreed upon verbally.

agreed to indemnify Crescent for any and all damages that might be suffered by third parties and, as heretofore stated, Crescent relies upon the second letter of December 23. The evidence and correspondence is clear to the effect that Dixilyn declined so to do and declined to execute the towage release clause requested by Crescent. Crescent, of course, knew before the refusal of Dixilyn to execute those documents that Dixilyn did not intend to release Crescent from any liability to third parties due to the negligence of Crescent. In order for one to release the other party for damages due to its own negligence, the contract of indemnity must be clear and definite in its terms that such is the intention . . .

"Since the damages to the bridge flowed from the negligence of Crescent, it is clear under the above authorities that Dixilyn did not indemnify or agree to indemnify Crescent by its letter of December 23."

We have re-stated all of the evidence in the record which would support the district court's finding as to the intent of Dixilyn and as to Crescent's knowledge or notice of that intent. Mr. Tidwell signed the letter contract on behalf of Dixilyn in reliance upon advice from Griffin and Stentz, the underwriter's representatives. That advice was not communicated to Crescent, nor was Crescent advised of the reasoning or intention upon which that advice was based. Actually the advice which Griffin and Stentz gave Tidwell recognized that the meaning and intent of the contract were unfavorable to Dixilyn, but expressed the view that the contract was illegal. "We don't like it; it's been proven that it's not legal by a prior case in court; that it's not a legal document, but if they insist on you

signing it, it will be all right to go ahead but we don't like it, but you can sign the rest of it."

Dixilyn's rejection of the Tower's Release Clause attached to Crescent's letter of December 19 and its rejection of the sentence stricken from Crescent's first letter of December 23 are not necessarily inconsistent with an intent on the part of Dixilyn to release Crescent from any liability to third parties due to the negligence of Crescent. To the contrary, Dixilyn's refusal to accept the Tower's Release Clause and its insistence on eliminating the sentence from the letter may have been because Dixilyn was not willing to accept liability (1) for fault and negligence on the part of Toltec and Ouachita and their owners, and (2) for collision damages occasioned by Crescent's tug Orleans on its voyage up river to pick up the Julie Ann. If the second letter of December 23 which Dixilyn approved as a part of the agrement of towage expressed plainly and unequivocally that Dixilyn accepted liability for any damage claims of third parties, including those caused by Crescent's negligence, or that Crescent was to have the benefit of Dixilyn's insurance, then the intention so expressed is not inconsistent with Dixilyn's earlier rejections of the Tower's Release Clause and of the sentence stricken from Crescent's first letter of December 23. On the other hand, if that letter is doubtful or ambiguous, then we should place ourselves as nearly as possible in the situation of the parties and should consider the language of the agreement in the light of the previous meeting and correspondence and of all of the attendant and surrounding circumstances. Compare Restatement of Contracts, Section 230-235.

> "The cardinal rule of interpretation of indemnity contracts is the same as in the case of other types

of contracts, namely, the ascertainment of the intention of the parties." Annotation 175 A.L.R. 29.

This Court has held in many cases that the failure of an indemnity contract to refer expressly to negligence evidences an intention not to indemnify against losses resulting from the indemnitee's negligence.[3]

In two cases where the contract did expressly refer to negligence, it was held to provide indemnity for losses resulting from the indemnitee's negligence.[4]

The more recent case of *Batson Cook Co. v. Industrial Steel Erectors*, cited in note 2, *supra*, while holding against the indemnitee, did so both because of failure to use the "talismanic words," and also because of inability "to find the equivalent clear intent in other language of the agreement." 257 F. 2d at 412. Finally, our most recent opinion on the subject expressed the view that the rule requiring that in order to relieve the indemnitee from liability for losses caused by his own negligence, the contract must contain an express stipulation to that effect "rests on an unsound and dangerous foundation" for reasons well stated by Chief Judge Tuttle:

> "It presumes, first of all, that one party's assumption of liability for losses due to another's negligence is an 'unusual' and 'hazardous' under-

[3] Southern Bell Telephone & Tel. Co. v. Mayor & Aldermen of Meridian, 5 Cir., 1935, 74 F.2d 983,986; Halliburton Oil Well Co. v. Paulk, 5 Cir., 1950, 180 F.2d 79, 81; Martin v. American Optical Co., 5 Cir., 1950, 184 F.2d 528, 529; W. C. Shepherd Co. v. Royal Indemnity Co., 5 Cir., 1951, 192 F.2d 710, 717; Standard Oil Co. v. Wampler, 5 Cir., 1955, 218 F.2d 768, 770; Batson Cook Co. v. Industrial Steel Erectors, 5 Cir., 1958, 257 F.2d 410, 412, et seq.

[4] Thomas v. Atlantic Coast Line R. Co., 5 Cir., 1953, 201 F.2d 167, 169; A.G.S. R. Co. v. L&N R. Co., 5 Cir., 1955, 224 F.2d 1, 4.

taking. We cannot agree. In the light of modern conditions, we perceive little justification for so characterizing the indemnitor's obligation. Insurance companies assume this obligation every day, especially in connection with automobile liability policies. And, it is common knowledge that the device of insuring against one's own negligence through indemnity contracts is frequently employed in other business ventures.

"Perhaps more important, even assuming that the burden imposed on the indemnitor is 'unusual' or 'hazardous', the majority rule presumes that courts have the power to alleviate or eliminate this burden by construing the indemnity agreement in a manner which is patently inconsistent with the plain and clear meaning of the language employed by the contracting parties. This is a dangerous and unwarranted extension of the judicial function. If a court feels that contract imposes an extraordinary liability on one of the parties, it may, in certain instances, pronounce the contract void as being contrary to public policy. But where, as here, a contract does not violate public policy, we have no authority to achieve the same result by concluding that the parties did not really mean what the unambiguous language of their agreement imports."

Jacksonville Terminal Co. v. Railway Express Agency, Inc., 5 Cir., 1962, 296 F. 2d 256, 262, 263.[5]

Thus the strict rule so frequently expressed in the cases appears to be giving way somewhat to the modern practice

[5]We recognize that a part of this criticism does not apply to a case of admiralty or maritime jurisdiction in view of the more extensive power of the Supreme Court in such cases. See Gilmore & Black, The Law of Admiralty, Sec. 1-16, pp. 40-42.

of providing liability insurance, and of bargaining as to which party shall bear the expense of such insurance. According to Mr. Apgar's testimony that expense was large; recently, in towing another drilling rig, Crescent had been charged one per cent of the value of the craft to be towed as a premium to protect for the one trip against liability for any damages. If Crescent had assumed that expense, it would have been reflected in its charge for towage. Actually, the rate charged on the Tug Orleans was $35.00 an hour, which Mr. Apgar testified was the customary charge for a normal operation with the Orleans.[6]

The letter contract plainly stated that the "additional clause" was "part of the consideration for our undertaking the towage."[7] The contract then provided:

> "It is particularly understood and agreed that you are authorized to and by this agreement do release and relieve us from any liability for account of your underwriters and that any damage claims urged by third parties as well as any claim which may be urged by virtue of damage to the drilling rig in the course of the towage shall be for yor account and account of your underwriters."

Some liability might have rested on Crescent for unseaworthiness not caused by negligence, but the most substantial liability to which Crescent might be subjected was that based on its own real or claimed negligence. If "any

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[6]Crescent was authorized to contract for the services of the other tugs, the Ouachita and Toltec, at the best rates available, and was not questioned on that part of the transaction.

[7]In its letter of December 19, to which the proposed "Tower's Release Clause" was attached, Crescent had stated "it being mutually understood and agreed that in consideration of including this clause lower rates prevail."

claims urged by third parties," as used in the exculpatory sentence, is interpreted not to include claims based on Crescent's negligence, then the provision is deprived of any real meaning.[8]

If Dixilyn had any doubt of Crescent's intention that doubt should be removed by the next paragraph of the letter:

> "It is further understood that the amount of the insurance protection which you have in force equals the value of the hull of the barge as to hull insurance and amounts to four million dollars as to third party claims."

Why should Crescent be interested in Dixilyn's insurance unless that was meant also to protect Crescent? As to third-party claims, Dixilyn's insurance was to amount to four million dollar. When that agreement is coupled with the agreement in the preceding paragraph "that any damage claims urged by third parties . . . in the course of the towage shall be for your account and account of your underwriters," the conclusion is inescapable that Dixilyn agreed to afford Crescent the benefit of Dixilyn's insurance. There seems little doubt that Griffin and Stentz, representatives of Dixilyn's underwriters, clearly understood Crescent's intent, but chose to rely on their opinion that ". . . it's been proven that it's not legal by a prior case in court . . .

The district court having held that the contract was not sufficiently specific to require Dixilyn to indemnify Cres-

[8] The "Tower's Release Clause" attached to Crescent's letter of December 19 had put Dixilyn on notice that Crescent was seeking indemnity against losses resulting from its own negligence.

cent against third-party claims based on Crescent's negligence, or to bind Dixilyn to afford Crescent the benefit of Dixilyn's liability insurance, did not reach the question of whether such a contract is valid. The "prior case in court" which led Griffin and Stentz to think the contract invalid was, in all probability, *Bisso v. Inland Waterways Corporation*, 1955, 349 U. S. 85, or its companion case, *Boston Metals Co. v. The Winding Gulf*, 1955, 349 U. S. 122. In those cases the Supreme Court created, or accepted as based upon public policy, a judicial rule in admiralty invalidating contracts releasing towers from all liability for their negligence.[9]

In *Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp.*, 1959, 360 U.S. 411, the Court held that where the exculpatory clause had been filed as part of a tariff with the Interstate Commerce Commission it should not be struck down as a matter of law until the parties had been afforded a reasonable opportunity to obtain the views of the Commission, and stated:

> "The rule of *Bisso*, however applicable where the towboat owner has 'the power to drive hard bargains,' may well call for modification when that power is effectively controlled by a persuasive regulatory scheme.
>
> "Further, it may be noted that the clause relied on in this case is by its terms restricted to the situation where shipments are transported to barges furnished by others than the towboat owner.

[9]Mr. Justice Black delivered the opinion of the Court in **Bisso** with the concurrence of the Chief Justice and of Justices Clark and Minton. Justice Douglas wrote a separate concurring opinion and Justice Frankfurter wrote a full dissenting opinion in which he was joined by Justices Reed and Burton. Justice Harlan did not participate.

> Whatever may be the considerations involved in forbidding a towboat to contract for exemption from liability for negligence in other circumstances, it may be that different considerations apply when the towboat moves barges which are delivered to it loaded, so that it never has an opportunity adequately to inspect them below the waterline, and which, if defective, may create emergency situations where a small degree of negligence can readily lead to very substantial monetary loss. *If the peculiar hazards involved in towing a barge supplied by the shipper are great, and the methods of guarding against those hazards uncertain, it may be that in an area where Congress has not, expressly or by fair implication, declared for a particular result, the federal courts should creatively exercise their responsibility for the development of the law maritime to fashion a particularized rule to deal with particularized circumstances.*" (Emphasis supplied.)

360 U. S. 418, 419, 420.

Virtually the same distinction suggested in the part of the last quotation which we have emphasized was adopted by the Second Circuit in an opinion by Judge Frank the year before the decision in *Bisso*. *North River Barge Line v. Chile* S.S. *Co.*, 2 Cir., 1954, 213 F. 2d 882. The Southern District of New York has since held that the stricture of *Bisso* is not applicable to invalidate an exculpatory clause where the tower had undertaken to tow a scow in an ice-clogged river. The district court said:

> "Here, the tower, perceiving that there was unusual danger in towing in ice, made it a condition of his assuming a contract of towage that he be spared the difficulty and expense of defending

himself in lawsuits resulting from accidents which were likely to result in the extrahazardous situation into which the tow owner had voluntarily put his property. Accordingly, the structure of the Bisso case is not applicable to the limited relief from liability at issue."

Chile Steamship Co. v. The Justine McAllister, S.D. N.Y., 1958, 168 F. Supp. 700, 702.

The rationale of the rule in *Bisso* was thus expressed in the opinion of the Court:

> "The two main reasons for the creation and application of the rule have been (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains."

Bisso v. Inland Waterways Corp., *supra*, 349 U. S. at 91.

Reason (1) is inapplicable to the facts of the present case upon much the same ground as that expressed in *Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp.*, *supra*. Reason (2) is clearly inapplicable to the facts of this case. Crescent's acquiescence in Dixilyn's rejections of two exculpatory provisions indicates that there was no economic presure exercised by Crescent in the negotiation of the contract. The evidence showed that Crescent had competition on movements of this kind from three harbor towing companies in New Orleans and from other in Mobile and in the Galveston-Houston area. Crescent was in no position to overreach Dixilyn or to drive a hard bargain. We conclude that, under all of the circumstances of

this case, the *Bisso* rule is not applicable to prevent Dixilyn from indemnifying Crescent against third-party claims based on Crescent's negligence or to prevent Dixilyn from binding itself to afford Crescent the benefit of Dixilyn's liability insurance.

It was stipulated that Crescent carried hull insurance and protection and indemnity insurance on the tug Orleans in an amount more than sufficient to cover the amount of the claims of the libelants in this case. Dixilyn insists that, if it must indemnify Crescent, the measure of damages is the cost of Crescent's insurance and relies on *Standard Oil Co. of Texas v. Wampler*, 5 Cir., 1955, 218 F. 2d 768, 771. In that case, Standard, after being furnished a certificate showing that the policy of insurance secured by Wampler did not protect Standard, made no objection. Judge Allred writing for this Court said:

> "Under these circumstances, it seems to us the proper measure of damages would be the premiums paid for this insurance.[4]
>
> "[4] Cf. Capital Life Ins. Co. v. Driscoll, Tex. Civ. App., 199 S.W. 872, 875."

The Court of Civil Appeals of Texas, in the case cited, had said:

> "Where an applicant contracts for a certain character of insurance policy and such policy is refused, and he can then only obtain a like policy at an increased annual premium, the proper measure of damages, we think, is the difference between the premiums of the policy contracted for and the policy he can get." (199 S.W. at 875.)

In the instant case Crescent had received no notice prior to the collision that Dixilyn had failed to obtain insurance to indemnify it and Crescent against third-party claims whether based on Crescent's negligence or not.[10] This case is therefore distinguishable from *Standard Oil Co. of Texas v. Wampler*, *supra*, and Dixilyn is liable to Crescent for the amount, with interest and costs, paid by Crescent to the libelants. The judgment is reversed and the cause remanded for the entry of a judgment consistent with this opinion.

REVERSED WITH DIRECTIONS.

A true Copy
Test:

EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals,
Fifth Circuit

By CLARA R. JAMAC
Deputy
New Orleans, Louisiana

July 23, 1962

[10]We, of course, intimate no opinion as to whether either Crescent or Dixilyn has a claim against Dixilyn's underwriters since they are not parties to this litigation.

APPENDIX "B"

IN THE

DISTRICT COURT OF THE UNITED STATES

For the Southern District of Mississippi
Western Division

No. 871 in Admiralty

MISSISSIPPI STATE HIGHWAY COMMISSION, CITY OF NATCHEZ, DEPARTMENT OF HIGHWAYS, STATE OF LOUISIANA,
Libelants

versus

DIXILYN DRILLING CORPORATIONS AND CRESCENT TOWING & SALVAGE COMPANY,
Respondents

OPINION OF THE COURT

The Libelants, on December 22, 1958, filed their libel in the District Court, seeking to recover damages in the amount of $41,363.24, which they had sustained when their bridge across the Mississippi River, located between Natchez and Vidalia had been struck by the off-shore drilling barge, Julie Ann. The accident occurred December 27, 1957. Libelants averred that the Defendants, Dixilyn Drilling Corporation and Crescent Towing & Salvage Company, Inc., were guilty of negligence that proximately caused the damages to the bridge. In March, 1959 Dixilyn Drilling Corporation, hereinafter referred to as Dixilyn, filed its answer denying negligence on its part, but admitted it had employees on board the rig who were in charge of raising and lowering the legs that will hereinafter be more particularly described, but denied the failure to lower the

legs was any negligence on the part of Dixilyn. It averred that the fault was all on Crescent and that Crescent did not have sufficient power to stop movement of the offshore drilling rig when it became apparent that the same could not pass under the bridge without one of its vertical legs colliding with the bridge, and further averred that Crescent failed to give the signal it should have given in time to lower the legs. In March, 1959 Crescent filed its answer and denied any negligence on its part and averred that the collision was due to the negligence of Dixilyn; averred that the rig was fully manned and controlled by a crew of specialists during the trip down the river; averred that Crescent did not have dominion or control over the maneuvering of the barge or the legs thereof and that the fault was entirely due to the crew of the Dixilyn. At the same time Crescent filed a petition under Rule 56 of Admiralty. This petition was based on the contract between the parties for the performance of the service of towage. It attached thereto as exhibits two letters, one dated December 19 and one dated December 23, 1957, which it alleged constituted the agreement. The petition further alleged that under the terms of the contract Dixilyn had agreed (1) to indemnify Crescent for all damages which might arise out of the movement, including claims of third parties; and (2) to procure full insurance protection at its own expense against all risks, including damage to any bridge or structure, and such insurance to insure to the benefit of Crescent as well. Dixilyn answered the petition and denied that it had agreed to the indemnity provisions of the contract or to the provisions relative to the insurance, and denied that the Dixilyn crew had anything to do with the movement of the legs other than to raise or lower them as directed by the employees of Crescent;

denied that its crew was in charge of the timing and mechanics of raising and lowering the legs or that there was any error on its part in reading or reporting the draft marks of the legs; and denied the interpretation that was placed on the contract by Crescent. On April 21, 1959 Libelants answered the petition under Rule 56 of Admiralty and averred that one or both of the Defendants were liable. After several pretrials the Defendants stipulated that the Libelants were entitled to a judgment for the damages to the bridge against either one or both of the Defendants. In March of 1960 the case came on for trial on its merits with reference to the contest between the Defendants as to which one was liable.

The controversy grew out of a contract between Crescent and Dixilyn under the terms of which Crescent contracted to tow down the Mississippi River from Vicksburg to New Orleans, Louisiana a large off-shore drilling barge or rig named the JUDIE ANN. It left Vicksburg, Mississippi on December 26, 1957 and as it undertook to pass under the bridge which crosses the Mississippi River at Natchez one of the legs on the rig had not been sufficiently lowered to pass under the bridge and it stuck the bridge, doing damage to the amount of $41,363.24. This rig was gigantic in structure. She was 194 feet long, 152 feet wide and 20 feet deep, triangular in shape, with one movable leg at the bow and two at the stern. The legs were 175 feet long, with open truss steel frame construction. The lower ends contained pontoons or spud tanks 35 feet in diameter and 35 feet in overall height. The legs provided a tripod on which the platform could be raised or lowered at the rate of approximately one foot per minute. The draft of the hull was 13 feet. Beyond the main deck was a machinery deck containing a complex lot of equipment

and tanks necessary for power service and oil well drilling operations. On the main deck were located draw works, pipe racks, two revolving deck cranes, three anchor wenches and 2-story living quarters, atop which was a control tower. The rig was a complete unit. The living quarters were spacious, affording accommodations for 45 men, with year-round temperature control.

The Defendant Crescent is a towing company, engaged in harbor, off-shore and ocean towing and tug work, and sometime in November of 1957 Crescent sought the business of towing the rig down the Mississippi River ultimately to its off-shore location. This solicitation was in the form of a letter dated December 18, 1957 from E. J. Pic, Jr., operating manager of Crescent, to Mr. Pickering of Dixilyn. Sometime between December 16 and 18, 1957 a meeting was held in the New Orleans office of Dixilyn, at which meeting there were present M. O. Boring, Jr., President of Dixilyn; Russell Tidwell, a petroleum engineer for Dixilyn; Charles D. Wood of Charles D. Wood Company, a marine surveyor representing Southern Marine and Aviation Underwriters Insurance, one of the excess coverage carriers for Dixilyn; H. W. Blakely of Charles D. Wood Company, a marine surveyor of Southern Marine and Aviation Underwriters, Inc.; Warren C. Apgar, Vice President of Crescent; and William S. Smith, Jr., also a Vice President of Crescent. The problem of transporting the JULIE ANN from Vicksburg to New Orleans was discussed, and particularly the size of the rig, the length of the legs, the current, and the size and number of the tow boats that were to be used in the towage of the rig downstream. After various discussions it was found that John J. Brechtel, a Crescent employee and experienced river man and tugboat operator, engaged by Crescent and regularly employed

by them, could be furnished, and Crescent agreed to place Captain John J. Brechtel in charge on its behalf before understaking to tow the rig to its point of destination; that he would be in command of the tug and all tows, and it was further agreed that Dixilyn would have an experienced man on the rig who would be in charge of lowering the legs of the rig when he was notified by Captain Brechtel that the legs should be lowered. At this meeting it was discussed as to the length of the legs that should be left off in order to reduce the force of the current on the rig and in the discussion the length of 60 feet was considered, but finally Mr. Brigham, who represented Dixilyn, advised that 30 feet already had been left off the legs and ultimately Crescent agreed that 30 feet left off would be sufficient. Apgar, representing Crescent, suggested that Crescent would require a clause in the towing agreement releasing Crescent from any and all liability in connection with the movement. Nothing definite was agreed on at this discussion, other than that Crescent would undertake the towage and would place in charge of it Captain Brechtel. The question of a clause in the towage agreement releasing Crescent of all liability was not determined at this meeting, but finally was agreed upon by correspondence after some negotiation and elimination of oral demands that were made by Crescent and the agreement ultimately was reduced to writing, as is shown by letters hereinafter to be referred to.

After that meeting another one was held on December 18 and 20, 1957 in the offices of Dixilyn, where representatives of each party were present, as well as representatives of Southern Marine & Aviation Underwriters. However, these representatives of the Underwriters were there simply as consultants and had no authority to bind anyone, and

at this meeting the nature of the release clause was discussed, but no definite agreement reached. Griffin and Stentz requested Apgar to submit the type of release clause desired by Crescent and on December 19 Apgar wrote Dixilyn, to which was attached the standard towage release clause used by Crescent. Dixilyn declined to execute that and requested Apgar to submit another type. Brigham, who represented Dixilyn, was not present when it arrived, so Tidwell, an authorized representative of Dixilyn, received it and upon its receipt called Griffin and Stentz of Southern Marine for their comments, and after talking to them declined to accept it, but asked that Apgar submit another clause for their approval. On December 23, 1957 Apgar wrote a letter setting out what they desired and this was received by Tidwell, who did not understand the full meaning of the letter and so again he called Griffin and Stentz and was advised by Griffin and Stentz that the letter was objectionable because the first sentence of the second paragraph was illegal and unenforceable. Tidwell then relayed this information to Apgar, who then called Griffin and Stentz to determine what he could further agree to. Griffin and Stentz told him they could not agree to that, but for them to submit another letter excluding the objectionable sentence and they would instruct Tidwell to sign it. Apgar then sent a third letter, dated also December 23, and upon its receipt by Tidwell he called Griffin and Stentz for advice. Griffin told him to sign the letter in that form, but that it was illegal and unenforceable, so his signing it would make no difference, and thereupon the second letter of December 23 was signed by Tidwell and copy returned to Crescent. Tidwell then went to Vicksburg to join the JULIE ANN. The important

part of the second letter of December 23, 1957 reads as follows:

> "It is particularly understood and agreed that you are authorized to and by this agreement do release and relieve us from any liabilities for account of your underwriters and that any damage claims urged by third parties as well as any claim which may be urged by virtue of damage to the drilling rig in the course of the towage shall be for your account and account of your underwriters."

The first letter of December 23, 1957 contained this language:

> "You agree to indemnify us, our tugs and equipment and all other parties taking part in the towage and their equipmnet and our and their underwriters of and from any and all liability or claims which may arise out of the towage of the drilling barge."

This sentence was eliminated and does not constitute a part of the written agreement.

Crescent contends, among other things, that Dixilyn is estopped to deny liability under that agreement because Dixilyn knew that that part of the agreement was void and unenforceable. This contention of estoppel cannot be accepted because Dixilyn did nothing to mislead Crescent. The parties were dealing with each other at arms length and had received advice from their attorneys. The doctrine of estoppel therefore does not apply.

On December 24 Crescent's tug ORLEANS left the city of New Orleans for Vicksburg with Captain Shirer as pilot and Walter Puckett as relief pilot, Robert Ricord

as engineer, a Mr. Gonzales as relief engineer, and an oiler. Fog delayed their arrival in Vicksburg for the appointed time for the departure of the rig. About midnight of Christmas Day the 4,000 h.p. triple screw TOLTEC arrived at the LeTourneau plant in Vicksburg. She was in command of Captain Dellie Clark with Captain E. M. Mathes as pilot on the forward watch. About the same time the 1800 h.p. twin screw OUACHITA, a riverboat from Vicksburg, reported at the LeTourneau plant. She was commanded by Captain W. W. Powell as master and Captain Louis O'Donnell as pilot. The JULIE ANN was located in the river at the LeTourneau yard. Her hull was raised out of the water about 9 feet on her legs. On board were Tidwell, Charles Wood and Wayne B. Hughes, who had been resident engineer for Dixilyn during the construction of the rig and whose duty it was to lower and raise the legs when directed to do so by Captain Brechtel. On board also was Lloyd Cotton, a marine engineer in charge of customer relations between LeTourneau and Dixilyn and who was on board as advisor to Dixilyn only. Also on board were a number of Dixilyn employees and a number of electricians and welders employed by LeTourneau. These LeTourneau employees were doing additional work as the boat was to be towed down the river, but had no connection with the towing or maneuvering of the flotilla whatsoever. Captain Brechtel was the master and in complete charge of the flotilla and had authority over all of Crescent employees.

About 8:00 A.M. on December 26 the two tugboats made up to the JULIE ANN, the TOLTEC to a steel bar across the drilling slot in the stern of the rig and the OUACHITA to the TOLTEC'S port side. Captain Brechtel missed connections and failed to arrive at 8 o'clock

on December 26. However, Captain Clark, who is a competent tugboat operator, inquired of Hughes if Dixilyn was ready, received a reply that Dixilyn was ready, and thereupon these tugs started out from Vicksburg with the rig. Captain Brechtel was an experienced operator of tugboats on the river and had towed two other LeTourneau drilling rigs down the river prior to this time. The flotilla had no trouble during the voyage down the river until it anchored for the night a considerable distance above Natchez. Captain Brechtel knew the river, the currents and the dangerous spots, and it was his judgment upon which all of Crescent relied. He joined the flotilla before they left the next morning from the point where they had anchored for the night. Captain Louis O'Donnell of Crescent rode on top of the JULIE ANN control tower and gave signal instructions to Captain Clark by a telephone communications system rigged between the JULIE ANN and the pilot house on the TOLTEC. About 2:00 P. M. the flotilla was joined by the tug Orleans, which made up to the starboard side of the TOLTEC.

Down the river about 5-3/4 miles, upstream from Natchez, an electric power line crosses the river. The lowest part of the line was approximately 108 feet above the surface of the river and the depth of the river at that point was 41 feet. At this point the tow was turned around and headed upstream to test the ability of the towing vessels to stop the rig. The legs were lowered approximately 35 feet and the power supplied by the TOLTEC, the OUACHITA and the ORLEANS was sufficient to hold the tow. The power of the TOLTEC was then reduced to allow the JULIE ANN to drift under the power line with the draft of 35 to 45 feet on her legs. After this maneuver the flotilla was moored for the night at a point

known as Rifle Point and it was at this place that Captain Brechtel joined the flotilla. No difficulty was encountered from Vicksburg to this point, but care was exercised in coming under the power lines. Captain Brechtel had come by taxi to Natchez and at Natchez he joined Captain Harry Wilson, who was in charge of the United States Engineers' boat, the ORLEANS, and that boat proceeded to Rifle Point with Brechtel and there Captain Brechtel boarded the flotilla. Captain Wilson had informed Captain Brechtel of the various depths of the channel from a point immediately in front of the Natchez bridge upstream for a distance of two miles or more. Upon arriving at the flotilla, Brechtel went aboard his tug, the ORLEANS, to assist in mooring and then went on the JULIE ANN. After a discussion of the conditions of the river, depth of the water, the dangers of the currents and the location of the rock ledge, known only to Captain Brechtel, he (Brechtel) determined that 55 feet draft on the legs would be sufficient to clear the rig through the Natchez Bridge. The lowest part of the rig was 142.9 feet above mean sea level and Captain Brechtel determined that there was a channel well inn excess of 60 feet in depth, approximately 1000 feet wide, extending from Natchez bridge upstream a distance of more than two miles.

About 7:00 A. M. the flotilla was somewhere in the neighborhood of Learned's Mill, about 1-1/4 miles above the Natchez bridge. The rig was turned around and headed upstream and the legs were lowered to a draft of 35 feet. At this point a test was made of the holding power of the tugs against the tows and in the opinion of Captain Brechtel, with the legs lowered 35 feet the tugs would hold. No test was made at this point, or at any other point, to determine the holding power of the tugs with

the legs lowered to a depth of 55 feet, which was required in order to pass under the bridge. Without making a test to a depth of 55 feet, Captain Brechtel, in charge, permitted the flotilla to drift downstream toward the bridge before giving orders or notice to depress the legs. Captain Brechtel, with his knowledge of the river, knew that there was a submarine cable crossing the river about 2,500 feet above the bridge and about 1,500 or 2,000 feet above it there was a rock ledge that made out from the Mississippi shore. He knew that under the bridge there was a right hand set or right hand draft in the current away from the Mississippi bank toward a bridge pier on the West side of the navigation span. He knew this condition of the current had a tendency to force boats into that pier. Without making any further tests, he maneuvered the flotilla toward the Mississippi bank across the rock ledge, and at no time did he bring the flotilla to a stop after having crossed the ledge or give any signal to Hughes when to begin to lower the legs. He failed to stop the flotilla after he crossed the dangerous and hazardous rock ledge for Hughes to lower the legs 55 feet and neglected to give Hughes notice when to begin lowering the legs, as he had agreed to do and upon which assurance Hughes relied, and it was Hughes who discovered for himself that a leg was going to strike the bridge. As the legs were lowered the power of the current was too great for the tugs even to stop the barge, or even slow it down, until Hughes could lower the legs to the necessary depth. The engine on one of the boats was defective and not sufficient to put forth its full power, but even if it had put forth its full power, still the power of all the tugs would have been insufficient to hold the boat with the legs lowered to a depth of 55 feet. When it was made apparent to

Brechtel that the flotilla would not clear, he ordered all boats full speed ahead, but was unable to stop the flotilla or slow down in time for the legs to be sufficiently lowered. Brechtel contended that Hughes miscalled the reading of the depth of the legs, but I am unable to find from all the testimony in this case that he relied upon such reading or that he had any reason or justification to rely upon same, as the function of Hughes on the JULIE ANN, and only function in so far as the towage was concerned, was to lower or raise the legs when directed so to do by Brechtel. Hughes knew nothing about maneuvering the flotilla and knew nothing about the currents or the danger spots in the river, but insofar as maneuvering a tow down the river, the flotilla was entirely in charge of Captain Brechtel. The tow itself had no power, but was controlled entirely by the movements of the tugs and the power afforded by the tugs, all of which were under the command of Captain Brechtel. As the flotilla was proceeding under the bridge and Mr. Hughes discovered that it would probably not pass under the bridge unless the tow was slowed down, he began immediately, as soon as he discovered the perilous situation, to lower the legs as rapidly as could be done. He was guilty of no negligence or carelessness in failing to begin lowering the legs earlier for the reason that he did not know where the rock ledge was and was depending on Captain Brechtel to advise him when to lower the legs. He continued to lower the legs as rapidly as the power afforded under the mechanism would permit him to do. The mechanism and the construction of the legs provide no way by which the lowering can be speeded.

The JULIE ANN, with all of the drilling equipment and paraphanalia on board, probably weighed several hundreds of tons and it was known to Crescent that towing

her down the river would be a very hazardous undertaking. She was a special craft, requiring special skill, management and control. On the voyage down the river Crescent knew that there were some three or four bridges under which she would have to pass. Crescent knew the location of utility lines and pipes which traversed the river and it could be foreseen, or should have been foreseen that unusual care and caution in the undertaking should be exercised. Not to have seen and anticipated this condition of itself would be negligence on the part of Crescent. The task required an unusual and extraordinary amount of power to safely maneuver it. The obligation rested upon Crescent to navigate the flotilla with reasonable care, depending upon that degree of care commensurate with the hazardousness of the undertaking. The JULIE ANN had no power of its own and no one on board who was expected or, under the contract, required to do any of the maneuvering or perform any other function other than to lower the legs or raise the legs when ordered so to do. Crescent owed the duty to third parties to exercise reasonable care in navigating this flotilla down the river commensurate with the unusual and extraordinary circumstances that confronted it. Captain Brechtel realized that it was a very hazardous undertaking to pass under the bridge and did turn around and place the tugs downstream to the JULIE ANN so as to push against her upstream in order to have more holding power. However, Crescent had neglicted to furnish sufficient tugs or sufficiently powerful tugs to control and maneuver the barge and her equipment.

Under all the testimony in this case Crescent was negligent in not furnishing sufficient power to hold the JULIE ANN against the current when its legs were being ex-

tended to the required depth of 55 feet. The Crescent had had experience in towing heavy tugs and also had experience in towing two flotillas similar to the one that was being towed on this particular occasion, and it should have known the dangers attendant upon an undertaking like this and should have supplied additional tugs or tugs with more power than the combined power of these tugs. The tug ORLEANS was unable to exert its full power because of a defective engine which failed at the crucial moment. In reaching this conclusion I am not taking into consideration the testimony that when they reached the Baton Rouge bridge Crescent supplied an additional tug for the purpose of safely navigating under that bridge. I excluded this from consideration because it is something that happened after the occurrence at the Natchez Bridge, but after excluding this testimony I find that Crescent knew or should have known that the power was insufficient. Captain Brechtel, who was in complete charge and control of the flotilla, was also guilty of negligence in not completely stopping the flotilla and lowering the legs to a depth of 55 feet before it reached the Natchez bridge. He knew that the current was running 4 or 5 miles an hour and knew that when the spuds were lowered to 55 feet it would be very difficult to control the flotilla because of the increased power of the current propelling the flotilla downstream and should have taken precautions to have had the legs lowered in ample time to have passed under the bridge safely. He was negligent in not making a test of the holding power of the barges with the legs lowered 55 feet when he was some two or three miles upstrea from the bridge. He was negligent in his failure to notify Hughes earlier when to lower the legs and in not stopping immediately after he crossed the rock ledge in order for

Hughes to have lowered the legs to a depth of 55 feet. Hughes exercised reasonable care when he began to lower the legs as soon as he saw and appreciated the danger confronting him and was guilty of no negligence that in any way contributed to the collision.

Under these facts, as a matter of law, the Crescent is liable for all the damages. Many authorities could be cited to sustain this view, but sufficient is the case of The Ames and The Carroll No. 20 and The Edwin Chilton, 66 Fed. (2) 413; The Clarence P. Howland, 16 Fed. (2d) 25.

The second question presented by this record for determination is whether or not the Dixilyn agreed to indemnify Crescent for any and all damages that might be suffered by third parties and, as heretofore stated, Crescent relies upon the second letter of December 23. The evidence and correspondence is clear to the effect that Dixilyn declined so to do and declined to execute the towage release clause resquested by Crescent. Crescent, of course, knew before the refusal of Dixilyn to execute those documents that Dixilyn did not intend to release Crescent from any liability to third parties due to the negligence of Crescent. In order for one to release the other party for damages due to its own negligence, the contract of indemnity must be clear and definite in its terms that such is the intention. Batson-Cook Co. v. Industrial Steel Erectors, 257 Fed. (2) 410; Standard Oil Co. of Texas v. Wampler, 218 Fed. (2) 768; Bisso v. Island Waterways Corpn., 349 U.S. 85.

Since the damages to the bridge flowed from the negligence of Crescent, it is clear under the above authorities that Dixilyn did not indemnify or agree to indemnify Crescent by its letter of December 23. Southwestern Sugar & Molasses Co. v. River Terminal Corpn., 360 U.S. 411,

is not in conflict with Bisso and in no way overturns the holding in the Bisso case. All the authorities cited by Crescent have been given careful study, but are not applicable to the facts of the present case and it would unduly prolong the length of this opinion to undertake to differentiate them. The authorities that have been cited hereinabove are conditioned upon the legal issues presented. The facts as herein stated and the law as herein declared constitute my finding of fact and conclusion of law.

Libelants in the case are entitled to a judgment in the sum of $41,363.24 against the Crescent Towing & Salvage Company, Inc., and the liability of the Crescent Towing & Salvage Company, Inc. is established for that amount. The cross bill of Crescent Towing & Salvage Company will be dismissed.

This, the 5th day of December, 1960.

/s/ S. C. MIZE
United States District Judge

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 297

DIXILYN DRILLING CORPORATION,
Petitioner,

versus

CRESCENT TOWING & SALVAGE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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IN THE

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CRESCENT TOWING & SALVAGE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

This brief is being filed in opposition to the application for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

The Statement of Fact presented in the application is substantially correct as far as it goes, but a description of the drilling rig JULIE ANN is necessary for the Court properly to understand the nature of the obligation undertaken for the movement of the rig. For this purpose, we respectfully refer Your Honors to its description contained in the opinion of the Court of Appeals below, found in the Appendix to the Petition herein at Pages 36 and 37.

Your Honors will note that this rig is obviously an unusual, bulky and unmaneuverable object. At the time the towage was being performed, the rig had not yet

been completed and was being moved down the Mississippi to New Orleans from the builder's yard at Vicksburg. At New Orleans, additional work was to be performed on the rig. Accordingly, the accident which is the subject of this litigation occurred when there were on board a substantial number of shipyard employees as well as a full crew of the owner's representatives, who were operating the legs in order that sufficient clearance could be obtained by the rig when it passed under any bridges. Crescent had nothing whatever to do with the operation of the legs.

The District Court found that Crescent was negligent in the performance of the towage. Although the Court of Appeals did not reach that point, it did indicate that if it had to decide the factual issue, it would probably reverse, or at least be confronted "with an extremely difficult decision."[1] However that may be, the questions presented by the petition for certiorari make no reference to the factual situation, and obviously any present discussion of the facts is beyond the scope of the application or this opposition.

The application for the writ presumes that an exception to the rule of *Bisso*[2] must be carved in order that the decree below be permitted to stand. *Bisso*, however, involved a situation where a dumb barge was towed on a routine voyage, whereas in the instant case a full crew and a number of shipyard workers were on board the rig for the purpose, among others, of operating its legs. Two of the fact issues in the case were whether or not the mechanism for raising and lowering the legs of the rig was in good operating condition and whether or not the mechanism was being properly operated by Dixilyn's employ-

[1] Opinion of Court of Appeals, Appendix to Petition for certiorari, p. 35.

[2] *Bisso v. Inland Waterways Corporation*, 349 U.S. 85, 75 S. Ct. 629.

ees. Crescent charged that the accident occurred because the Dixilyn employees misread the draft marks on the legs and failed to lower them sufficiently to clear under the bridge, this being the primary and proximate cause of the accident rather than any negligence in the navigation of the tug.

Moreover, a choice of rates had been offered to Dixilyn, based on whether or not a release clause was to be included in the towage contract, coupled with an agreement to afford Crescent the benefit of Dixilyn's insurance. It is to be borne in mind that Crescent was charging only $35.00 an hour for its tug and that it was undertaking to tow a craft worth several million dollars. A trip insurance policy on the rig would have cost approximately 1% of its value, and upon being offered the choice of rates, the owner of the JULIE ANN voluntarily chose the cheaper rate where Crescent would not be required to insure and where risks of loss were to be borne by it (and its own underwriters). It is submitted, therefore, that this case is completely different from *Bisso*, and that the Court of Appeals was correct in concluding that "the *Bisso* rule is not applicable to prevent Dixilyn from indemnifying Crescent against third party claims based on Crescent's negligence or to prevent Dixilyn from binding itself to afford Crescent the benefit of Dixilyn's liability insurance."[3]

Assuming, however, that the towage situation here was substantially the same as that involved in *Bisso*, it is submitted that the "Questions Presented" in the petition for certiorari must be answered adversely to the contentions of the petitioner. The first question presented is whether or not an exception should be made to the

[3] Opinion below, *supra*, footnote 1, pp. 49, 54.

"rule" that public policy precludes the inclusion of a release clause in a towage agreement. This, of course, is the only question which could properly be classified as being potentially within the review jurisdiction of this Court. We submit that the question, if properly posed by this record, should be answered in the affirmative and merits no review.

Two reasons for the announcement of the "rule" of *Bisso* formed the basis of the opinion of the four-justice majority in that case. These reasons were, first, to discourage negligence by making wrong-doers pay damages, and, second, to protect owners from being overreached by towers having the economic power or a monopolistic position enabling them to drive hard bargains or overreach the other party to the towage contract. Mr. Justice Douglas specially concurred with the four-justice majority on the theory that an economic brief or a record which would be more definite in the latter area should be presented to him before he would be inclined to take the other side. The record in this case is complete and affirmative on both scores. It was shown beyond peradventure in the District Court that "Crescent was in no position to overreach Dixilyn or to drive a hard bargain."[4] The record also shows that there were a number of towers, competitors of Crescent, who were in a position to undertake this isolated towage movement of a new drilling rig from the builder's yard, and Dixilyn was wholly free, from the economic point of view, to negotiate with any one of a number of Crescent's competitors who were available to furnish the services required.

Moreover, there is in this case no reason for an application of the rule of *Bisso*. This was not, as in *Bisso*,

[4] Opinion below, *supra*, footnote 1, p. 53.

an ordinary movement of a small dumb barge such as is encountered daily by the thousands on the inland waterways system of this country. This was a movement of an unwieldly, unmaneuverable monster, and could almost be said to be unique in that very few triangular shaped, 2500 ton displacement floating drilling rigs with "legs" projecting 175 feet into the air are towed in the Mississippi upriver from New Orleans. The very size, shape and lack of maneuverability present a perfect example of why it is necessary for a tower to seek a release of liability insofar as its towage contracts are concerned.

It was for this reason, we submit, that the rule of *Southwestern Sugar*[5] was fashioned. That rule is cited in the petition herein (p. 10) and relied upon by the Court of Appeals in the italicized portion of its opinion.[6] The towage in this case certainly involved "peculiar hazards", and the case offers an ideal example of a situation where "the Federal courts should creatively exercise their responsibility for the development of the law maritime to fashion a particularized rule to deal with particularized circumstances."[7]

The rationale of the rule of *Bisso* relative to discouragement of negligence by forcing wrong-doers to pay for their own tortious acts clearly is not applicable in this case. As a matter of fact, the clause under consideration here was not solely a release of liability: It contemplated that insurance on the JULIE ANN should inure to the benefit of Crescent, and Dixilyn affirmatively agreed to afford Crescent the benefit of its insurance. (The Court of Appeals found that the conclusion

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[5] *Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp.*, 360 U.S. 411, 79 S. Ct. 1210.

[6] Opinion below, *supra*, footnote 1, p. 52.

[7] *Supra*, note 2.

that it intended to do so was inescapable.[5] The question therefore simply becomes one of whether Crescent's underwriters or Dixilyn's underwriters should pay the loss.

No "discouragement of negligence" is inherent in this type of arrangement, because under either circumstance the underwriters of the tug or the underwriters of the drilling rig would ultimately satisfy the damage claim. As is pointed out above, although *Bisso* set up the rule that an exculpatory clause in an ordinary towage contract *per se* is invalid, the decision did not go so far as to hold that a benefit of insurance clause would be invalid because the ultimate liability for damages was to be borne by the underwriters of the tow rather than the underwriters of the tug. Nor does *Bisso* reprobate the use of a benefit of insurance clause in a towage contract. Moreover, the value of the rig was so great that if Crescent had to insure the rig, it would have had to charge a very substantial amount for the towage movement, and when the negotiations for the confection of the towage contract were being carried on, the decision to have its own insurance cover any accidents was made by Dixilyn in order to save the amount which it would have been charged for the towage if Crescent were to be required to assume responsibility for damages to the tow or to third parties. The decision to do so was supported by a consideration: the offer of a lower rate for the service.

Since there was no monopoly involved in the area of free competition shown to have existed in the field of towage such as was involved here, and since there was no discouragement of negligence inherent in a shifting of responsibility from one set of underwriters to another, any reason for the rule of *Bisso* disappears; and even if

[5] Opinion below, *supra*, footnote 1, p. 50.

it were not to have disappeared, the subsequent rule of *Southwestern Sugar* to the effect that the Federal courts should fashion their own rules as to particularized circumstances where particularized hazards are involved, comes into full play and must be applied in the instant situation. This is exactly what the Court of Appeals for the Fifth Circuit has done, and since it has set forth this reasonable exception to the general rule pursuant to the directive of Your Honors, there should be no modification of its holding.

The second question presented by the application for certiorari is not, we submit, a matter which is within the scope of the review jurisdiction of this Court. No question of national importance whatever is raised, and the sole problem presented is whether or not the Court of Appeals for the Fifth Circuit should have interpreted the contract in one way or another.

As a matter of fact, this identical question was presented to Your Honors in connection with a prior decision of the Fifth Circuit, *Jacksonville Terminal Company v. Railway Express Agency, Inc.*,[9] where an application for certiorari was denied on April 23, 1962.[10]

In that case, which arose out of Florida, there was involved the interpretation of a contract providing for an indemnification agreement between the lessor and the lessee of a railway terminal property in Jacksonville. The question was presented as to whether or not it was necessary to use the "talismanic" word "negligence" in a hold harmless and indemnification agreement, where the indemnitee was seeking indemnification under a contract clause providing therefor but not specifically men-

[9] 296 F. 2d 256.
[10] 369 U.S. 860, 82 S. Ct. 949.

tioning that the "negligence" of the indemnitee was included. The Court of Appeals for the Fifth Circuit reviewed its prior jurisdiction and, aware that its conclusion was "inconsistent" with its prior holding in *Batson-Cook*,[11] nevertheless held that full force and effect was to be given to the indemnification agreement even though the circumstances involved negligence of the indemnitee and negligence as such was not specifically included in the hold harmless agreement.

Although we are not familiar with the reasons for the refusal to grant certiorari in *Jacksonville Terminal*, we presume that this Court simply felt that the question raised did not merit the attention of the Court because of its being purely local and a matter of contract interpretation. The same applies here. Moreover, Judge Tuttle's opinion in *Jacksonville Terminal*, quoted at length in the opinion below,[12] is, we submit, a complete answer to the contention of the petitioner herein. The fact is that the decision below in connection with the interpretation of the contract is unassailable and rests on firm grounds. There can be no doubt but that a fair reading of the contract here involved requires the holding that the parties intended there to be a release of all liability, whether caused by negligence or otherwise. The District Court held to the contrary, but it did so prior to the decision of the Court of Appeals in *Jacksonville Terminal*,[13] the latest expression of the Court prior to its decision

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[11] *Batson-Cook Company v. Industrial Steel Erectors*, 257 F. 2d 410, where the court held:

> "Since the contract confessedly does not contain the talismanic words 'even though caused, occasioned or contributed to by the negligence, sole or concurrent' of the Indemnitee, or like expressions, the Indemnitee seeks to find the equivalent clear intent in other language of the agreement."

[12] Opinion below, *supra*, footnote 1, pp. 47-48.

[13] The District Court entered its decision in this case on December 5, 1960; the opinion in *Jacksonville Terminal* was announced by the Fifth Circuit on November 17, 1961.

herein, and in the mistaken belief that it was following the correct rule of interpretation of the Court of Appeals.

CONCLUSION

We respectfully submit that there is no ground for the granting of a writ of certiorari on the contract interpretation question, and there is no merit in the petition for a review of the judgment of the Court of Appeals insofar as the towage rule announced by that Court in this case is concerned. Accordingly, we respectfully urge that the application for certiorari be denied.

Respectfully submitted,

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September 28, 1962

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NO. 297

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

DIXILYN DRILLING CORPORATION,
Petitioner

v.

CRESCENT TOWING & SALVAGE COMPANY,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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UNITED STATES STATUTES

28 U.S.C. 1254(1) 2

NO. 297

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v.

CRESCENT TOWING & SALVAGE COMPANY,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

Citations To Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit (R. 153-170) is reported at 303 F. 2d 237. The opinion of the United States Court of Appeals for the Southern District of Mississippi (R. 138-150) is reported at 198 F. Supp. 788.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254 (1).

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 9, 1962 (R. 171). The Petition for Writ of Certiorari was filed on August 4, 1962, and was granted Octobe 15, 1962 (R. 172).

Questions Presented

I.

Is an exception to be made to this Court's admiralty rule of law "based on public policy, invalidating contracts, releasing towers from all liability for their negligence."[1]

II.

If such an exception is to be made to this *Bisso* rule, must the contract between the parties clearly express in unequivocal terms their intention for the craft being towed to indemnify the tower from the consequences of the tower's own negligence?[2]

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[1] Rule quoted directly from **Bisso v. Inland Waterways Corporation,** 349 U.S. 85, at page 90, 99 L. Ed. 911, at page 917, 75 S. Ct. 629, 1955 A.M.C. 899, at page 904 (1955).

[2] The Court below held, contrary to eight of its earlier decisions, that such intention no longer had to be expressed in unequivocal terms, but where the contract of indemnity used "doubtful or ambiguous" terms, that the Court would look to the conferences and negotiations and correspondence and the attendant and surrounding circumstances leading up to the execution of the contract in an effort to try to determine the intention of the parties

III.

If such an exception is to be made to this *Inso* rule, and if this contract expresses the intent of the parties in unequivocal terms, what is the proper measure of damages in this case?

Statement

The Petitioner, Dixilyn Drilling Corporation, contracted with the Respondent, Crescent Towing & Salvage Company, to supply the necessary tugs to tow Petitioner's offshore drilling barge, JULIE ANN, down the Mississippi River from Vicksburg, Mississippi to New Orleans, Louisiana. In the course of the towage, one of the legs of the drilling barge struck the Natchez Bridge across the Mississippi River because of the inability of the tugs supplied by Crescent to stop the drilling barge above the bridge until such time as the legs on the drilling barge were lowered to the proper depth to clear the bridge. Crescent supplied three tugs to perform the towage, and it is undisputed that the navigation of the flotilla, consisting of these three tugs and the drilling barge, was completely controlled by Crescent's own pilot, a Captain Brechtel, and that Dixilyn's sole function was to lower the three legs on the drilling barge to the proper depth upon receiving instructions from Crescent's Captain Brechtel to do so.

The owners of the bridge sued Crescent to recover their damages and Crescent impleaded Dixilyn claiming that Dixilyn's negligence caused the damages and in the alternative, that if Crescent was negligent and therefore liable to the bridge owners that Dixilyn had agreed to indemnify Crescent for the consequences of Crescent's own negligence.

A brief description of what transpired up to the time of the damage before stating what the District Court held will probably be helpful to the Court.

In order to navigate the drilling barge under the Natchez Bridge, it was Crescent's plan to turn the flotilla around so that it would be headed up the river in order that the stern of the tug boats and the JULIE ANN would pass under the Natchez Bridge first. Above the bridge, Crescent's Captain Brechtel was to stop the flotilla completely, give the order to lower the legs to Dixilyn's personnel and hold the flotilla in its stopped position at a point well above the bridge until the necessary depth of the legs in the water had been obtained. Crescent's Captain Brechtel's navigational plan called for the lowering of the legs of the JULIE ANN to a depth of fifty-five feet in the water and was to be done in two stages. The legs were first lowered to thirty-five feet at a distance approximately a mile to a mile and a quarter above the bridge. Crescent's Captain Brechtel did not lower the legs to the full fifty-five feet at this time, because of a rock shelf about fifteen hundred feet upstream from the Natchez Bridge which made out from the Mississippi shore, and he did not want to risk damage to the flotilla by taking it across this rock ledge with fifty-five feet of draft on the legs. The decision not to lower the legs to fifty-five feet at the time they were initially lowered to thirty-five feet was made by Crescent's Captain Brechtel as the navigator of the flotilla.

After crossing this rock ledge, Crescent's Captain Brechtel planned to stop the flotilla completely and lower the legs to the desired fifty-five feet. As this would be an additional twenty feet that the legs would have to be lowered into the water, and as the legs lowered at a constant rate of

approximately one foot per minute, this meant that Crescent's Captain Brechtel contemplated holding the flotilla completely stopped after crossing this rock ledge some fifteen hundred feet above the bridge a minimum of twenty minutes while the legs were lowered. After holding the flotilla in this position while the legs were lowered to the contemplated depth, once the desired depth on the legs had been obtained, Crescent's Captain Brechtel then planned to permit the barge to proceed down through the Natchez Bridge.

Obviously the key to the successful consummation of this plan for navigating the drilling barge under the Natchez Bridge was the complete stopping of the flotilla and the holding of it in substantially a fixed position above the bridge for approximately twenty minutes while the last twenty feet of the legs on the JULIE ANN were lowered into the water. The tugs supplied by Crescent were never able to stop the flotilla after it crossed the rock ledge as the District Court found (R. 146), and the bridge was damaged because the flotilla reached the bridge before enough time had elapsed for the legs to be lowered the last twenty feet.

The District Court found as a fact that Crescent's navigational plan failed and the bridge was damaged solely because of the negligence of Crescent and the unseaworthiness of Crescent's Tug ORLEANS. The District Court found Crescent negligent in five particulars:

> 1. Because Crescent failed to supply tugs with sufficient horsepower to completely stop the tow and hold it in the water long enough for the legs on the drilling barge to be lowered to the depth necessary to clear the bridge. (R. 148).

2. Because Crescent furnished the Tug ORLEANS with a defective engine so that it was not able to exert full power because its engine failed above the bridge at the crucial moment. (R. 149).

(Note: While not expressly stated in the District Court's opinion, there can be no dispute as a matter of law the Tug ORLEANS was unseaworthy because of this defective engine.)

3. Because Crescent's Captain Brechtel did not completely stop the flotilla immediately after crossing the rock ledge so that the legs could be lowered to the contemplated depth. (R. 149).

4. Because Crescent's Captain Brechtel did not make a test of the holding power of the tugs with the legs lowered to the contemplated depth well above the bridge before attempting to navigate the flotilla under the bridge. (R. 149).

5. Because Crescent's Captain Brechtel failed to notify Dixilyn's employee at an earlier time to start lowering the legs. (R. 149).

The District Court expressly found that Dixilyn was not negligent to any extent and fully performed its function of lowering the legs in connection with Crescent's unsuccessful attempt to navigate the flotilla under the Natchez Bridge. (R. 147-149).

Having found that it was solely the negligence of Crescent's and the unseaworthiness of Crescent's Tug ORLEANS which caused this damage, the District Court then considered whether or not the contract required Dixilyn as owner of the craft towed to indemnify Crescent as the tower for the consequences of Crescent's own negligence. The District Court, following the rule which had been

stated by the Court of Appeals below on eight separate occasions, held that the contract did not express in clear and definite terms that Dixilyn intended to indemnify Crescent for the consequence of Crescent's own negligence.[3]

Since the District Court held that the contract did not evidence such an intention of the parties in the required unequivocal terms, it did not reach the question of whether or not such a contract relieving Crescent, as the tower of the barge, of liability for its own negligence was invalid under the public policy rule announced by this Court in the *Bisso*[4] and *Winding Gulf*[5] cases.

Upon Crescent's appeal from the judgment of the District Court, the Court of Appeals below reversed the District Court on the basis of the contractual agreement between the parties. In so doing, the Court of Appeals held:

> 1. That even though the language of the contract between the parties relating to indemnity was "doubtful and ambiguous" (R. 163) and even though an intention on the part of Dixilyn to indemnify Crescent was not stated in the contract in unequivocal terms as the Court of Appeals below had heretofore required,

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[3] The District Court cited and relied on **Batson-Cook Company v. Industrial Steel Erectors,** 257 F. 2d 410 (C.A. 5, 1958), and **Standard Oil Company of Texas v. Wampler,** 218 F. 2d 768, (C.A. 5, 1955) in both of which the Court of Appeals below had expressly held that indemnity agreements are strictly construed against the indemnitee and that contracts would not be so construed unless the indemnitor's obligation to protect the indemnitee from his own negligence was expressed in unequivocal terms.

[4] **Bisso v. Inland Waterways Corporation,** 349 U.S. 85, 99 L. Ed. 911, 75 S. Ct. 629, 1955 A.M.C. 899 (1955).

[5] **Boston Metals Company v. SS Winding Gulf,** 349 U.S. 122, 99 L. Ed. 933, 75 S. Ct. 649, 1955 A.M.C. 927 (1955).

that by looking to the correspondence, conferences and circumstances surrounding the execution of the contract, it was the intention of the parties that Dixilyn indemnify Crescent for the consequences of Crescent's own negligence. This is exactly opposite to the result reached by the District Court.

2. Having concluded not from the terms of the contract itself, but from extraneous circumstances that Dixilyn as owner of the towed barge had agreed to indemnify the tower for the consequences of the tower's own negligence, the Court of Appeals below then held that such a contract was not controlled by the rule announced by this Court in the *Bisso* and *Winding Gulf* cases that contracts relieving towers of liability for their negligence were invalid because contrary to public policy. The Court of Appeals below thus attempted to create an exception to this Court's public policy rule as announced in the *Bisso* and *Winding Gulf* cases.[6]

3. The Court of Appeals then considered another question not reached by the District Court with respect to the measure of damages to which Crescent might be entitled under the indemnity agreement. The Court of Appeals below again refused to follow one of its earlier decisions[7] and held that Crescent was entitled to reimbursement for the full amount of damages paid to the bridge rather than the damages actually sustained by Crescent which was limited solely to the cost of insurance then in effect protecting Crescent against any and all loses such as the damages to this bridge.

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[6] **Bisso v. Inland Waterways Corporation**, 349 U.S. 85, 99 L. Ed. 911, 75 S. Ct. 629, 1955 A.M.C. 899 (1955); **Boston Metals Company v. SS Winding Gulf**, 349 U.S. 122, 92 L. Ed. 933, 75 S. Ct. 629, 1955 A.M.C. 927 (1955)

[7] **Standard Oil Company of Texas v. Wampler**, 218 F. 2d 768 (C.A. 5, 1955).

Summary of Argument

I.

(Full Argument, *infra*, pages 13 to 21)

The holding of the Court of Appeals below that Dixilyn as owner of the towed drilling barge could validly contract to indemnify Crescent for liabilities arising out of Crescent's own negligence and the unseaworthiness of Crescent's tugs is directly contrary to the rule announced by this Court in the *Bisso*[8] and *Winding Gulf*[9] cases that a contract releasing a tower from all liability for its own negligence was invalid because contrary to public policy. The reasons advanced by this Court for the promulgation of such a public policy rule were twofold—to discourage negligence by making wrongdoers pay damages and to protect those in need of goods or services from being overreached by those who had power to drive hard bargains. While recognizing the public policy rule of *Bisso* invalidating such indemnity contracts, the Court of Appeals below attempted to create an exception to this rule primarily on the basis of some dictum contained in this Court's opinion in the *Southwestern Sugar & Molasses* case.[10] In *Southwestern Sugar & Molasses* this Court indicated that if the peculiar hazards involved in a towing operation were great and if the methods of guarding against those hazards were uncertain, it might be that some exception to the *Bisso* rule

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[8] **Bisso v. Inland Waterways Corporation**, 349 U.S. 85, 99 L. Ed. 911, 75 S. Ct. 629, 1955 A.M.C. 899 (1955).

[9] **Boston Metals Company v. SS Winding Gulf**, 349 U.S. 122, 99 L. Ed. 933, 75 S. Ct. 649, 1955 A.M.C. 927 (1955).

[10] **Southwestern Sugar & Molasses Company, Inc. v. River Terminals Corporation**, 360 U.S. 411, 3 L. Ed. 2d 1334, 79 S. Ct. 1210 (1959).

would be indicated to deal with particularized circumstances.

The Court of Appeals below attempted to create an exception to the *Bisso* rule in this case when in fact neither of the two conditions precedent required by *Southwestern Sugar & Molasses* were present. In the instant case the hazards were not great, certainly no greater than the hazards confronting any tow passing through a bridge, and the method of guarding against the hazard of a collision with the bridge was not uncertain. The method of guarding against the hazard which resulted in the damages sued for in this case was quite simple—Crescent simply had to supply tugs with sufficient horsepower to stop and control the tow until the legs on the drilling barge could be lowered to the proper depth. Or as an alternative method of guarding against the hazard, Crescent simply had to make a test well above the bridge with the legs lowered to the contemplated depth for passage under the bridge to determine whether it had in fact supplied sufficient horsepower before attempting to navigate under the bridge.

Instead of creating an exception to the *Bisso* rule, this is a classic case for the application of the public policy rule of *Bisso*, particularly so since the rule was designed to discourage negligence by making wrongdoers pay damages. Crescent's conduct in this case—the complete failure to perform its obligation to supply sufficient horsepower to handle the tow, an obligation that was the very essence of its towage contract—graphically illustrates the need for the application to this case of the *Bisso* rule invalidating contracts which purport to release towers from liability for their own negligence.

II.

(Full Argument, *infra*, pages 22 to 34)

The Court of Appeals below held that since the language in the contract between Crescent and Dixilyn was doubtful or ambiguous on whether Dixilyn intended to indemnify Crescent for the consequences of Crescent's own negligence or for the unseaworthiness of Crescent's tugs, that it would look to correspondence, oral discussions, etc. between the parties in an attempt to try to ascertain their intention on the question of indemnity. In so holding, the Court of Appeals below declined to follow the general rule only recently reaffirmed in two decisions of this Court,[11] and followed in decisions from the Court of Appeals for the First, Second, Seventh, Eighth and Ninth Circuits and in eight previous decisions of the Court of Appeals below. This general rule is that unless the intention to do so is unequivocally expressed in the plainest of words in the contract, the law will not consider that the parties intended for one of them to indemnify the other for the consequences of the other's own negligence.

The Court of Appeals below declined to follow this general rule even though only fourteen days before its decision in the present case it had reaffirmed it.[12]

Additionally, in construing the contract in this case the Court of Appeals below also completely ignored two well-established rules of law relating to the interpretation of indemnity contracts. These rules are:

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[11] **Herd & Co. v. Krawill Machinery Corporation**, 359 U.S. 297, 3 L. Ed. 2d 820, 79 S. Ct. 766 (1959); **Boston Metals Company v. SS Winding Gulf**, 349 U.S. 422, 92 L. Ed. 933, 75 S. Ct. 649 (1955).

[12] **Halliburton Company v. Norton Drilling Company**, 302 F. 2d 431 (C.A. 5, 1962).

1. That a contract generally, and specifically a contract to indemnify, is strictly construed against the party who drafts it.

2. That a contract of indemnity, other than an insurance contract, is to be strictly construed in favor of the indemnitor.

The contract in this case was drafted by Crescent's own skilled admiralty counsel and even though it is a contract of indemnity, the Court of Appeals below did not strictly construe it against Crescent and in favor of the indemnitor, Dixilyn, as these two rules of contractual construction require.

If an exception is to be made to the public policy rule of *Bisso* that a towing company cannot contract away its liability for negligence, the least that should be required in the towage contract is that the language plainly and unequivocally provide that the craft being towed is assuming the tower's liability for the tower's own negligence or the unseaworthiness of the tower's vessel. If unusual liabilities such as negligence and unseaworthiness are to be passed on from the tower to the craft towed, the written contract between the tower and the craft towed should express this assumption of unusual liabilities by the craft towed in the plainest of terms. This has been the almost universal rule in this country.

III.

(Full Argument, *infra*, pages 34 to 36)

Upon concluding that Dixilyn had to indemnify Crescent, the Court of Appeals below held that Crescent's damages amounted to the sum that Crescent would be called

upon to pay to the bridge owners, notwithstanding the fact that Crescent had insurance coverages that would indemnify it for such payment. In so holding, the Court of Appeals below declined to follow its earlier decision in the *Wampler* case.[13] Had the Court of Appeals applied the same measure of damages in this case as it did in the *Wampler* case, Crescent would have been entitled to recover only the premiums paid by Crescent for the insurance which had indemnified it for the sum it had to pay the bridge in damages. Since we are concerned with making Crescent whole and not both Crescent and its insurance underwriters in this case, the loss actually sustained by Crescent was the premiums paid for the insurance and nothing more. This is the proper measure of damages in this case if Dixilyn is ultimately held liable to indemnify Crescent.

Argument

I.

No exception to this Court's Admiralty rule of law invalidating contracts releasing towers from liability for their own negligence should be created in this case.

In holding that Dixilyn as owner of the towed drilling barge could validly contract to indemnify Crescent's tugs for all liability to third parties for Crescent's own negligence, the Court of Appeals below attempted to create an exception to this Court's Admiralty rule of law, based on public policy, that such contracts were invalid. This rule invalidating such contracts was clearly enunciated by this Court in:

[13] **Standard Oil Company of Texas v. Wampler**, 218 F. 2d 768 (C.A. 5, 1955).

Bisso v. Inland Waterways Corporation, 349 U.S. 85, 99 L.Ed. 911, 75 S.Ct. 629, 1955 A.M.C. 899 (1955); and

Boston Metals Company v. SS WINDING GULF, 349 U.S. 122, 99 L.Ed. 933, 75 S.Ct. 649, 1955 A.M.C. 927 (1955).

In the landmark *Bisso* case, this Court specifically held that a contract releasing a tower from all liability for its negligence which resulted in damage to the tow itself was invalid because contrary to public policy. In so doing, this Court stated that because of:

> ". . . judicial history and cogent reasons in support of a rule outlawing such contracts we now, despite past uncertainty and difference among the circuits, accept this as the controlling rule."[14]

On the same day in the *WINDING GULF* case,[15] this Court made it perfectly plain that a contract relieving a towing tug of all liability for its negligent navigation was contrary to public policy not only insofar as damages to the tow was concerned, but also with respect to damages of third parties caused by the negligence of the towing tug.

In declaring that a towing tug could not contract away its liability for its own negligence, this Court made it perfectly clear that there were two main reasons for the creation and the application of this rule. It stated them thusly:

[14] **Bisso v. Inland Waterways Corporation,** 349 U.S. 85, at page 90, 99 L. Ed. 911, at page 917, 75 S. Ct. 629, 1955 A.M.C. 899, at page 904 (1955).

[15] **Boston Metals Company v. SS Winding Gulf,** 349 U.S. 122, 99 L. Ed. 933, 75 S. Ct. 649, 1955 A.M.C. 927 (1955).

". . . (1) To discourage negligence by making wrongdoers pay damages, and

(2) To protect those in need of goods or services from being overreached by others who have power to drive hard bargains."[16]

Notwithstanding this rule of law based on public policy, the Court of Appeals in the present case attempts to create an exception to this public policy rule and in doing so relies primarily on some dictum contained in this Court's decision in *Southwestern Sugar & Molasses Company, Inc. v. River Terminals Corporation*, 360 U.S. 411, 3 L.Ed. 2d 1334, 79 S.Ct. 1210 (1959), a case in which this Court had under consideration a clause relieving a tower of liability for its negligence which had been filed as a part of a tariff with the Interstate Commerce Commission. After holding that such a clause in a tariff filed with the Interstate Commerce Commission should not be declared invalid without the Interstate Commerce Comission having had an opportunity to express its views, this Court indicated that the rule of *Bisso* might call for modification where an effective regulatory scheme controlled the liabilities of tug and tow. This Court then stated:

"If the peculiar hazards involved in towing a barge supplied by the shipper are great, and the methods of guarding against those hazards uncertain, *it may be* that in an area where Congress has not, expressly or by fair implication, declared for a particular result, the federal courts should creatively exercise their

[16] **Bisso v. Inland Waterways Corporation**, 349 U.S. 85, at page 91, 99 L. Ed. 911, at page 918, 75 S. Ct. 629, 1955 A.M.C. 899, at page 905 (1955).

responsibility for the development of the law maritime to fashion a particularized rule to deal with particularized circumstances."[17] (Emphasis supplied)

Apparently believing that this language meant that exceptions were to be made to the *Bisso* rule in certain circumstances, the Court of Appeals so held in this case when in fact the two conditions precedent to any such exception as stated by this Court in the *Southwestern Sugar & Molasses Company* case were not present. The two conditions precedent to creating an exception to the *Bisso* rule as stated in the *Southwestern Sugar & Molasses* case were:

1. That the peculiar *hazards* involved in towing a barge supplied by the shipper *be great.*
2. That the *methods of guarding* against those great and peculiar hazards *be uncertain.*[18]

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[17] **Southwestern Sugar & Molasses Company, Inc. v. River Terminals Corporation,** 360 U.S. 411, at page 419, 3 L. Ed. 2d 1334, at page 1341, 79 S. Ct. 1210 (1959).

[18] In both of the other cases cited and relied on by the Court of Appeals below in support of the exception it created to this Court's **Bisso** rule, the hazards excepted met both these tests—in both the hazards were great and the method of guarding against them was not only uncertain but non-existent if the barges were to be towed at all.

In the decision rendered before **Bisso** by the Second Circuit, **North River Barge Line v. Chile S.S. Co.,** 213 F. 2d 882 (1954), the great hazard was ice and the only method of guarding against it was not to tow the barge at all. Nevertheless, the tower did not seek to avoid its liability otherwise for its own negligent towage and the contract expressly provided only that the tower would not be liable for towing the barge in the ice. This is a far cry from the complete exoneration from liability for its own negligence which Crescent has been given by the Court of Appeals below in the present case notwithstanding this Court's rule to the contrary in **Bisso.**

Likewise, in the District Court case, **Chile Steamship Company**

Neither of these two factors is present in the instant case, for while this offshore drilling barge may have been unusual in its characteristics because of its legs, and therefore may have presented a peculiar hazard[19] in navigating underneath the bridges on the Mississippi River, this hazard was not great, and certainly was not a hazard in which the method of guarding against it was uncertain. The hazard was not great because by a simple adjustment in the position of the legs by either raising or lowering them to a proper depth in the water all bridges could be navigated with safety. And the method of guarding against the hazard of these legs on this drilling barge striking a bridge was not uncertain.

The method of guarding against this hazard, however peculiar it might have been, was both certain and simple indeed—Crescent simply had to supply tugs with sufficient

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v. **The Justine McAllister**, S D N Y, 195 F Supp. 700 (1958), the great hazard of ice and there was in fact no method of guarding against the hazard of ice. Here again the tower assumed all liabilities for its own negligence and excluded only damages due to ice and the contract specifically so provided.

Whatever exception to **Bisso** might be justified where there is no method of guarding against a hazard such as ice, is of no significance here whereby the simple method of supplying tugs with sufficient horsepower to stop and control the tow, Crescent would have completely eliminated the hazard which resulted in the damage to the bridge.

[19] Even that it was a peculiar hazard, however, is extremely doubtful for in every passage under a bridge by any tug and tow the risk and possibility of a collision with the bridge is an ever present hazard.

It can hardly be said that the hazard here is any more peculiar than that existing when a single river tow boat navigates 30 or 40 barges at one time through a bridge such as this or when one or more tugs navigate a large deep sea vessel without its own power under a bridge such as this.

horsepower to hold the drilling barge stationary in the river while the legs were lowered to the depth that would permit them to clear the bridges. Certainly there is nothing uncertain as to the method that should have been employed by Crescent to completely eliminate any danger of the drilling barge striking a bridge. Sufficient horsepower was all that was required, and as the District Court found, Crescent wholly failed in its contractual obligation to provide a sufficient amount of horsepower to guard against this hazard. By simply adding an additional tug or using tugs of greater horsepower than those supplied, Crescent had the certain means of eliminating all possibility of an accident ever occurring such as is involved in this case.[20]

But this is not the only certain and simple method which Crescent had of eliminating this hazard, for by the simple expedient of testing the ability of the three tugs which it supplied to hold the drilling barge while the legs were lowered to the desired depth before it ever approached the bridge, Crescent could easily have ascertained that the three tugs it had supplied were not of sufficient horsepower to hold the barge while the legs were lowered. The District Court expressly held that Crescent negligently failed to make such a test above the bridge where there was adequate water for this purpose and where there would have been no danger of damage to anyone or anything in the process of making the test. (R. 149)

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[20] Crescent supplied three tugs with engines that had a total of 6,375 horsepower (TOLTEC with 3,975 horsepower, OUACHITA with 1,800 horsepower and ORLEANS with 600 horsepower). Before taking the drilling barge under the Baton Rouge Bridge further down river, Crescent added a fourth tug with an additional 1,500 horsepower, making the total horsepower in going under the Baton Rouge Bridge equal 7875 horsepower an increase in horsepower by nearly 25%.

Instead of adopting these two certain and simple methods of guarding against the hazard of one of the drilling barge's legs coming in contact with the bridge, Crescent negligently failed to make any such test to determine the adequacy of the horsepower supplied and negligently supplied an inadequate amount of power to perform the towing contract which it undertook.

The very essence of the contract which Crescent made with Dixilyn was the supplying of sufficient power to perform the towing operation without damage to the drilling barge or to the bridges across the river. It not only negligently failed to employ these two certain and simple methods of guarding against this particular hazard, but it was also negligent in supplying the Tug ORLEANS in an unseaworthy condition because of its defective engine which failed above the bridge at the crucial moment.

Rather than creating an exception to the *Bisso* rule when neither of the conditions precedent to such an exception as set out by this Court in *Southwestern Sugar & Molasses*[21] are present, this is a classic case for the application of the public policy rule of *Bisso*, and particularly so because such a public policy rule was felt necessary by this Court primarily to discourage negligence by making wrongdoers pay damages in these days when "the dangers of modern machines makes it all the more necessary that negligence be discouraged."[22]

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[21] **Southwestern Sugar & Molasses Company, Inc. v. River Terminal Corporation,** 360 U.S. 411, at page 419, 3 L. Ed. 2d 1334, at page 1341, 79 S. Ct. 1210 (1959).

[22] **Bisso v. Inland Waterways Corporation,** 349 U.S. 85 at page 91, 99 L. Ed. 911, at page 918, 75 S. Ct. 629, 1955 A.M.C. 899, at page 905 (1955).

The negligence of Crescent in furnishing an unseaworthy tug, in supplying insufficient power, and in failing to make a test to determine if the power it had supplied was sufficient, is a flagrant, yes, almost willful disregard of the contractual obligations which it assumed as a matter of law when it agreed to tow the barge. Whatever the economic factors may be, and regardless of how many other towing concerns may have been interested in performing this towage for Dixilyn,[23] the fact remains that the *Bisso* rule was clearly and plainly designed to discourage and do away with the very kind of negligence of which Crescent was guilty in this case, and Crescent's attempts to contract away its liability for its own negligence must be declared invalid as contrary to public policy.

Until the decision of the Court of Appeals below in this case, clauses which attempted to release towers such as Crescent from liability for their own negligent towage were invalid, and the creation of an unwarranted exception to this Court's public policy rule of *Bisso* such as was attempted by the Court below must inevitably lead to great uncertainty and confusion in the maritime law relating to towage contracts—uncertainty and confusion that can only be resolved on a case to case basis after a full trial on the

[23] Crescent has repeatedly contended that Crescent was in no position to overreach Dixilyn or to drive a hard bargain because it offered some evidence that there were other competing towing companies who did the same type of towage. However the really crucial evidence necessary to sustain this contention is completely absent from the record—there is no evidence that any of Crescent's competitors would have undertaken the towage under a contract that would have made the tower liable for its own negligence and for the unseaworthiness of its own tugs. So far as this record shows all of Crescent's competitors would have been trying to obtain the same release from liability that Crescent sought.

merits of every damage claim arising out of every towage contract.

It is respectfully submitted that where a rule of law is founded squarely and steadfastly on public policy as is true of the *Bisso* rule, that the exceptions to this rule, if any, must be few and far between and that any exception must at the very least meet both conditions precedent to such an exception—(1) that the hazards be great, and (2) the method of guarding against them uncertain—set forth by this Court in *Southwestern Sugar & Molasses.*[24] The hazards were not great, and the method of guarding against the hazards were not uncertain, but simple indeed—Crescent simply had to supply sufficient power to control the drilling barge at all times. Certainly a tower such as Crescent here should not be permitted to contract away its liability for negligently failing to supply enough power to perform the very towing operations which were the essence of its contractual obligation.[25]

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[24] **Southwestern Sugar & Molasses Company, Inc. v. River Terminals Corporation,** 360 U.S. 411, at page 419, 3 L. Ed. 2d 1334, at page 1341, 79 S. Ct. 1210 (1959).

[25] In this respect it is strikingly similar to the essence of the contract which this Court relied on to imply as a matter of law a duty on a stevedoring contractor to indemnify the shipowner for damages arising out of the failure of the stevedoring contractor to perform its stevedoring services in a reasonably safe and workmanlike manner. See **Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.,** 350 U.S. 124, at page 133, 100 L. Ed. 133, at page 142, 76 S. Ct. 232 (1956).

If the law implies indemnity as was done in **Ryan,** for even stronger reasons an exception to **Bisso** should not be made to permit a tower to contract away its liability where it has negligently failed to perform its duty to supply sufficient power which is the very essence of the towing contract.

II.

If exception is to be made to Bisso rule, contract must clearly express in unequivocal terms intent of craft being towed to indemnify Tower for consequences of Tower's own negligence

The holding of the Court of Appeals below that since the contract did not express plainly and unequivocally an intention that Dixilyn would indemnify Crescent for the consequences of Cresent's own negligence, but rather was doubtful or ambiguous on this point, that the Court would then look to the correspondence and meetings and circumstances leading up to the execution of the contract to ascertain the intention of the parties, is directly contrary to the general rule applied in *two* recent decisions of this Court, in decisions from the Courts of Appeal for the First, Second, Seventh, Eighth and Ninth Circuits, and in *eight* previous decisions of the Court of Appeals below.

The two decisions of this Court are:

> *Herd & Co. v. Krawil Machinery Corp.*, 359 U.S. 297, 3 L. Ed. 2d 820, 79 S. Ct. 766 (1959);
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> *Boston Metals Co. v. THE WINDING GULF*, 349 U.S. 122, 99 L. Ed. 933, 75 S. Ct. 649 (1955).

Quoting the rule directly from *THE WINDING GULF* case, this Court stated in *Herd & Co.*:

> "Similarly, contracts purporting to grant immunity from, or limitation of, liability must be strictly construed . . . for they 'are not to be applied to alter familiar rules visiting liability upon a tort feasor for the consequences of his negligence, unless the clarity

> of the language used expresses such to be the understanding of the contracting parties.' "[26]

The same unequivocal language required in the contract itself by this Court before one tort feasor can pass on its liability for its own negligence to an innocent party is also required by the Courts of Appeals for the First, Second, Seventh, Eighth and Ninth Circuits.[27]

Prior to the present decision, that this was clearly the law on this point "not only generally, but . . . in the Fifth Circuit as well,"[28] had been plainly reaffirmed by the Court of Appeals below only four short years ago when it said:

> ". . . that while it need not be done in any particular language or form, unless the intention is unequivocally

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[26] **Herd & Co. v. Krawill Machinery Corp.**, 359 U.S. 297, at page 305, 3 L. Ed. 820, at page 825, 79 S. Ct. 766 (1959).

[27] First Circuit:
Turner Construction Company v. W. J. Halloran Steel Erection Co., 240 F. 2d 441 (1957).

Second Circuit:
Mostyn v. Delaware, L. & W. R. Co., 160 F. 2d 15 (1947), cert. denied 332 U.S. 700, 92 L. Ed. 355, 68 S. Ct. 82 (1947).

Miller v. Pennsylvania Railroad Company, 236 F. 2d 295 (1956).

Seventh Circuit:
Chicago & N. W. Ry. Co. v. Chicago Packaged Fuel Company, 195 F. 2d 467 (1952), cert. denied 344 U.S. 832, 97 L. Ed. 648, 73 S. Ct. 39 (1952).

Eighth Circuit:
Ocean Accident & Guarantee Corp. v. Jansen, 203 F. 2d 682 (1953).

Ninth Circuit:
Wallace v. U. S., 18 F. 2d 20 (1927).

[28] **Batson-Cook Company, Inc. v. Industrial Steel Erectors**, 257 F. 2d 410, at page 412 (C.A. 5, 1958).

expressed in the plainest of words, the law will consider that the parties did not undertake to indemnify one against the consequences of his own negligence."[29]

That such an intention to indemnify a party against its own negligence had to be unequivocally expressed in the contract itself was first enunciated by the Court of Appeals below in 1935,[30] was reaffirmed twice in 1950,[31] once in 1951,[32] once in 1953,[33] and twice in 1955,[34] prior to its decision in *Batson-Cook* in 1958 from which the rule has heretofore been quoted. When the language of the contract in this case is compared with the contractual language of the decisions of this Court, of the other Courts of Appeals and of these eight earlier decisions of the Court below, it is abundantly clear that the written contract in this case does not meet the general rule of those cases that the intention to indemnify Crescent against its own negligence must be unequivocally expressed in the plainest of terms. The only thing in writing evidencing any intention of

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[29] **Batson-Cook Company, Inc. v. Industrial Steel Erectors,** 257 F. 2d 410, at page 412 (C.A. 5, 1958).

[30] **Southern Bell Telephone & Telegraph Co. v. Mayor and Board of Aldermen of City of Meridian, Mississippi,** 74 F. 2d 983 (C.A. 5, 1935).

[31] **Martin v. American Optical Company,** 184 F. 2d 528 (C.A. 5, 1950); **Halliburton Oil Well Cementing Co. v. Paulk,** 180 F. 2d 79 (C.A. 5, 1950).

[32] **W. C. Shepherd Co. v. Royal Indemnity Co.,** 192 F. 2d 710 (C.A. 5, 1951).

[33] **Thomas v. Atlantic Coastline Railroad Company,** 201 F. 2d 167 (C.A. 5, 1953).

[34] **Standard Oil Company of Texas v. Wampler,** 218 F. 2d 768 (C.A. 5, 1955); **Alabama Great Southern Railroad Company v. Louisville & Nashville Company,** 224 F. 2d 1 (C.A. 5, 1955).

Dixilyn to indemnify Crescent for any purpose in this case is contained in the following language:

> "It is particularly understood and agreed that you are authorized to and by this agreement do release and relieve us (Crescent) from any liability for account of your underwriters and that any damage claims urged by third parties, as well as any claim which may be urged by virtue of damage to the drilling rig in the course of the towage shall be for your account and the account of your underwriters." (Parenthetical expression added)[35]

Realizing that this language could not meet the unequivocal terms required by its eight previous decisions,[36]

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[35] All of the contract which was in writing in this case is quoted in the opinion of the Court of Appeals and consists of Crescent's letter of December 23, 1957 with the sentence eliminated as shown in the Court's opinion (R. 159). The earlier letter from Crescent of December 19, 1957, with its attached Tower's Release Clause quoted in the opinion of the Court of Appeals below (R. 157-159), was rejected by Dixilyn.

[36] The contractual language in this case purported to **"release and relieve"** Crescent **"from any liability"** and from **"any damage claims urged by third parties."**

A brief look at the contractual language construed by the Court of Appeals in these eight earlier cases as not being sufficiently clear to require one party to indemnify another party for the consequences of its own negligence will quickly demonstrate why the Court of Appeals below had to make such a startling reversal in its approach to these indemnity contracts if it was to reach the result it did in this case:

1. In **Batson-Cook**, the indemnity clause provided for indemnity against **"any and all losses"** and **"to defend any suit"** and **"to pay all damages"**. The Court of Appeals below held that this language was not sufficiently clear to show the intent of the indemnitor to indemnify the indemnitee against losses arising out of the indemnitee's own negligence and expressly said that the word **"all"** did not include liabilities

the Court of Appeals below sought to avoid the rule of its eight decisions by stating that the holdings of those eight cases simply meant the failure to refer specifically to negligence in an indemnity agreement was only some evidence of an intention not to indemnify against such losses. In the present case, the Court of Appeals below thus took the absence of an expression in unequivocal terms simply as one of the factors to be considered in determining the intent

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arising out of the indemnitee's own negligence. 257 F. 2d 410 (C.A. 5, 1958).

2. In the **Wampler** case, the language employed was against **"any" loss,** and it was held that it failed to meet the requirement of the law that an agreement to indemnify or insure a party against its own negligence had to be expressed in unequivocal terms. 218 F. 2d 768 (C.A. 5, 1955).

3. In the **Shepherd** case, the language employed in the contract was to save harmless the surety from **"all costs, expense, loss or damage"**, and to repay the surety **"all monies expended"** under the contract. The Court of Appeals held that this language could not be construed to indemnify the surety against losses resulting from its own wrongdoing. 192 F. 2d 710 (C.A. 5, 1951).

4. In the **Martin** case, the contract provided that the lessor release the lessee from **"any and all damages"**. The Court of Appeals below held that this language did not require the lessee to indemnify the lessor against the lessor's own negligence, since there was no unequivocal expression of such intention. 184 F. 2d 528 (C.A. 5, 1950).

5. In the **Halliburton Oil Well** case, the contract provided that the indemnitee **"shall not be responsible for damages or losses of any kind whatsoever . . . whether resulting from the acts or omissions"** of the indemnitee. The Court of Appeals below held this language was not sufficient to require the indemnitor to pay for the indemnitee's negligence because such obligation had not been expressed in the contract in "unequivocal terms." 180 F. 2d 79, at page 84 (C.A. 5, 1950).

6. In the **Southern Bell Telephone Company** case, the indemnitor assumed **"all liabilities"** and agreed to indemnify the indemnitee against **"any and all loss or damage"**. In hold-

of the parties to a contract of indemnity, and proceeded to create for the Fifth Circuit an entirely new rule—that if an indemnity agreement does not cover the indemnitee's negligence plainly and unequivocally as had previously been required, that the Court would then consider the negotiations between the parties, the correspondence and other circumstances surrounding the consummation of the contract in an attempt to ascertain if the parties intended to

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ing this language not sufficiently clear to require the indemnitor to pay for the indemnitee's negligence the Court of Appeals below said:

"It is well settled that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting to him through his own negligent acts, where such intention is not expressed in unequivocal terms." 71 F. 2d 983, at page 984 (C.A. 5, 1935).

7. In the **Alabama Great Southern Railroad Company** case the contract provided for indemnity against **"any loss . . . in whatever manner the same may be caused or occasioned, whether by or through the negligence" of the indemnitee "or otherwise".** The Court of Appeals below held that this specific language although it referred to negligence was not sufficiently clear to cover "all losses" but was only sufficiently clear to require the indemnitor to pay for the indemnitee's simple negligence, and this Court expressly held that this language "could not properly be construed as intended to extend, or extending, to damage occasioned by willful conduct or wanton negligence" on the part of the indemnitee. 224 F. 2d 1, at page 4 (C.A. 5, 1955).

8. In the **Thomas** case, the indemnity clause in the contract provided that the lessor would be indemnified against **"any and all"** claims **"whether the same is the result of fire caused by negligent emission of sparks from the locomotive engines of lessor, or otherwise, however resulting."** The Court of Appeals below also held in this case that this language was sufficiently clear to cover only the simple negligence of the lessor, but was not sufficiently clear or explicit to evidence an intention that the lessee pay for the claims resulting from the lessor's willful or wanton negligence. 201 F. 2d 167 (C.A. 5, 1953).

do that which they did not say. What a tremendous and fantastic and unjustified reversal of a well-established rule of law this was!

The result is all the more shocking and inexplicable when two of the same panel of three judges[37] who decided the present case had only fourteen days before expressly stated that the general rule is:

> ". . . that a contract will not be construed to provide for indemnification of the indemnitee for losses due to his own neglect, unless the intention to do so is expressed in unequivocal terms."[38]

Thus did the same panel of Circuit Judges reaffirm the general rule enunciated by the eight previous decisions of this Court. Yet in the present case the same Circuit Judges hold that if the intention to indemnify is not in fact expressed in these unequivocal terms in the contract, then the Court will examine extraneous evidence in an attempt to determine whether the parties had actually intended to do that which they did not express in the unequivocal terms required by this Court's earlier decisions.

It is impossible to understand how the same panel of Judges sitting on the same Court can in the space of fourteen days reaffirm the general rule and then completely emasculate it by saying that if the parties do not comply with the rule, the Court will consider extraneous circumstances to see if, in fact, the parties intended their silence

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[37] Chief Judge Tuttle and Circuit Judge Wisdom. Circuit Judge Rives who wrote the opinion in the present case dissented but on other grounds.

[38] **Halliburton Company v. Norton Drilling Company**, 302 F. 2d 431, at page 436 (April 25, 1962).

to be equivalent to what the Court had said so many times before had to be expressed in unequivocal terms in the contract.

What an incongruous and chaotic result this is! It is respectfully submitted that the rule announced by the Court of Appeals below in the present case which requires a Court to look into the negotiations, correspondence, etc. leading up to the execution of an indemnity contract in an effort to determine whether one party agreed to indemnify another party for its own negligence, is unsound, unjust, impractical and fosters great uncertainty in the interpretation of contracts which leads inevitably to endless litigation in an attempt to ascertain the intention of the parties which should have been plainly stated in the contract itself.

The sound administration of justice requires that when the purpose of a contract is to impose the extraordinary liability for the tower's negligence or the unseaworthiness of its tugs on the craft towed that this purpose and intention be spelled out in unmistakable terms in the contract itself. It is only by such a requirement that contracting parties, their attorneys and the Courts can know in situations such as this what unusual liabilities are being assumed, if any, by the parties to a contract.

If an exception is to be created to the *Bisso* rule that a towing company cannot contract away its liability for negligence, it is respectfully submitted that contracting parties in the position of Dixilyn in this case are at least entitled to the protection of the rule which requires that contracts specifically provide in the plainest of language that the towed barge is assuming the tower's liability for the tower's negligence or the unseaworthiness of the tower's

vessels. Certainly this is not too much to ask of a party who drafts the contract such as Crescent did in this case.[39] The need for this to be plainly expressed is further emphasized when it is remembered that the basic rule of *Bisso* makes such provisions contrary to public policy and only exceptional circumstances may possibly create an exception to this public policy rule. Clearly if the liability is one that cannot be passed on unless an exception to the public policy rule of *Bisso* is made, it is all the more reason why such liability for negligence should not be passed from one party to another without the written contract expressing it in the plainest of terms.

Court below also ignored two well established rules of contractual construction

The Court of Appeals construed the contract in this case in complete and utter disregard of two well-established rules of law in interpreting indemnity clauses in contracts. These two rules which are so well settled that the citation of authority is unnecessary are:

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[39] That both Crescent and its skilled admiralty counsel well knew the definiteness required by the courts to pass on Crescent's liability for its own negligence or the unseaworthiness of its tugs to Dixilyn is amply demonstrated by the language contained in Crescent's standard "Tower's Release Clause", (Deft. Ex. 4A; R. 23, 40, 158) which was proposed by Crescent as a part of the contract but was not included because Dixilyn flatly declined to accept it. (R. 92). Crescent's "Tower's Release Clause" provides that the craft towed will indemnify Crescent for certain damages from **"any cause whatsoever, including loss or damage caused by negligence** of the Master, pilot and crew of the towing craft and our employees, agents and representatives." This definite language which would have eliminated any controversy was not included by Crescent in the contract accepted by Dixilyn obviously because Dixilyn had already refused to agree to it. Thus Crescent attempted to saddle Dixilyn with Crescent's liabilities by indirection after it saw that Dixilyn would not agree to it directly.

1. That a contract generally, and specifically a contract to indemnify, is strictly construed against the party who drafts it.

2. That a contract of indemnity, other than an insurance contract, is to be strictly construed in favor of the indemnitor.

Without dispute the language employed in the letter constituting the contract in this case is that of Crescent as supplier of the tugs and, in fact, was language drafted by its own skilled admiralty counsel with full knowledge of the decisions of this Court, of the other Courts of Appeals and of the eight previous decisions of the Court of Appeals below which had expresly held that to pass on the unusual liability of the tug's negligence to its tow that the contract had to express it in the plainest of language. Rather than strictly construing the contract drafted by Crescent's own admiralty counsel, the Court of Appeals does not construe the language at all, but holds that the language used by Crescent's counsel is not what the law required, and is in fact doubtful and ambiguous as to the intention of the parties. Instead of applying the general rule that no indemnification was intended because of this doubt and ambiguity, the Court of Appeals below proceeds to look to extraneous evidence completely outside the contract in an attempt to determine the intention of the parties. It is impossible to imagine a more liberal construction of a contract in favor of the party who drafted it rather than against it as the law requires than has been made by the Court of Appeals in this case.

But the error of the Court of Appeals below does not stop here, but rather it is compounded by its refusal to

follow still another tenet of contractual interpretation, a rule that it had firmly reiterated itself on five separate occasions since 1947. This is the rule of contractual construction of indemnity agreements that provides that they must be construed strictly in favor of the indemnitor, in this case the drilling barge being towed. In 1947 the Court of Appeals below stated this rule thusly:

> "On the other hand, it is certainly the general rule, that, where the indemnity is not contracted for from an insurance company whose business is to furnish indemnity for a premium and where indemnity is the principal purpose of the contract; but from one not in the indemnity business, and as an incident of a contract whose main purpose is something else, such as a sub-construction contract, the indemnity provision is construed strictly in favor of the indemnitor."[40]

On four subsequent occasions, the Court below has reaffirmed this rule of construction of indemnity contracts.[41]

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[40] **Employers Casualty Company v. Howard P. Foley Company**, 158 F. 2d 363, at page 364 (C.A. 5, 1947).

[41] In **Halliburton Oil Well Cementing Company v. Paulk**, 180 F. 2d 79 (C.A. 5, 1950) the Court said in part at page 84:

> "In considering this claim of indemnity we must bear in mind the rule that indemnity agreements are strictly construed against him who claims to be an indemnitee. . . . This is particularly true where the result would be to indemnify against one's own negligence, and it will not be so construed unless such obligation is expressed in unequivocal terms."

In **Martin v. American Optical Company**, 184 F. 2d 528 (C.A. 5, 1950) the Court stated at page 529:

> "This Court has had recent occasion to point to the strictness with which indemnity provisions are construed in favor of the indemnitor."

In **Thomas v. Atlantic Coast Line Railway Company**, 201 F. 2d

Contrary to the rule it had expressly stated on no less than five separate occasions since 1947, the Court of Appeals below not only did not strictly construe the indemnity provisions in the contract in favor of the indemnitor (the vessel being towed), but in fact did not construe the indemnity provisions of the contract at all, but rather attempted to ascertain the intention of the parties by looking to the conferences, correspondence and other surrounding circumstances connected with the contractual agreement. This it did without any reference whatsoever to the rule it had so often stated that a contract of indemnity had to be construed strictly in favor of the indemnitor.

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167 (C.A. 5, 1953) the Court reiterated its earlier holding in **Employers Casualty v. Foley**, 158 F. 2d 363 (C.A. 5, 1947) in almost identical language:

> "It is the general rule that where the indemnity is not contracted for from an insurance company whose business it is to furnish indemnity for a premium under a contract but is from one not in the indemnity business and is an incident of a contract whose main purpose is something else the indemnity provision is construed strictly in favor of the indemnitor." 201 F. 2d 167, at page 169 (C.A. 5, 1953)

In **Standard Oil Company of Texas v. Wampler**, 218 F. 2d 768 (C.A. 5, 1955) the Court stated in part at page 770:

> "On briefs Appellants recognized the rule that indemnity agreements are strictly construed against him who claims to be an indemnitee, and that is particularly true where the result would be to indemnify against one's own negligence, and that it will not be so construed unless such obligation is expressed in unequivocal terms. But Appellants say, 'the intention of the party to indemnify against the indemnitee's negligence need not be expressly stated in the contract provided it otherwise clearly appears in the language used.' There is nothing wrong with Appellants' statement of the rules. The difficulty is that, construing the contract strictly, the indemnity claim is not expressed in unequivocal terms."

When these two tenets of contractual construction, which are particularly appropriate when the unusual liabilties of negligence of the indemnitee and the 'unseaworthiness' of its vessels are sought to be passed on to another, are applied to the contractual language used in this case by Crescent's own counsel, the error of the Court of Appeals below is as plain and unequivocal as the language it had heretofore required in an indemnity contract before it would pass on the liability of an indemnitee for its own negligence to an indemnitor.

III.

If exception to be made to Bisso rule, and if contract is in unequivocal terms, the proper measure of damages is the cost to Crescent of the insurance it had covering the damages to the bridge

While it is not anticipated that the Court will reach this issue, but will reverse the Court of Appeals below for the reasons heretofore stated, if such is not the result, it is respectfully submitted that the Court of Appeals below used an improper measure of damages in this case.

The Court of Appeals below held that Dixilyn was liable to Crescent for the full amount of damages paid by Crescent to the owners of the bridge. In so doing it applied an entirely different measure of damages from that applied by it under identical circumstances in *Standard Oil Company of Texas v. Wampler*, 218 F. 2d 768 (C.A. 5, 1955). Had the Court applied the measure of damages set out by it in the *Wampler* case, Crescent's damages would have been assessed on the basis of the costs paid by Crecent for

it own insurance which covered the sums it had to pay to the bridge in damages.

It was stipulated in the District Court that this towage and the damages sustained by the bridge in this case were fully covered by Crescent's normal insurance policies and that no extra insurance was either required or taken out by Crescent (R. 55). Thus, it is abundantly clear that if Dixilyn must indemnify Crescent, Crescent's loss is not the amount of damages paid by it to the bridge owner, but rather the amount paid by Crescent to its insurance underwriter for the insurance which in turn paid the damages to the bridge. We are here concerned not with any agreement to indemnify both Crescent and its underwriters, but only with a possible agreement to indemnify Crescent itself. We are not concerned with making both Crescent and its insurance underwriters whole if Dixilyn must indemnify Crescent, but with what sum of money is necessary to make Crescent alone whole for the damages paid to the bridge. Clearly Crescent's only expenditure was the insurance premium it paid for the insurance coverage it had to protect it against claims such as those made by the bridge in this case.

While the Court of Appeals below attempts to distinguish its holding in the *Wampler* case from the present case, it is a distinction without substance, for even if Crescent had been specifically notified by Dixilyn that it was not providing insurance coverage for Crescent, there would have been no need for Crescent to obtain any additional insurance coverages since it was already fully insured for damages such as this under its regular insurance policy.

It is, therefore, respectfully submitted that the Court of Appeals below erred in declining to follow its earlier decision in the *Wampler* case and if this issue is reached by this Court, that the proper measure of damages be fixed at the cost of the premiums paid by Crescent for its insurance which fully indemnified Crescent for the damages sustained by the bridge.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court of Appeals below should be reversed and this matter remanded for the sole purpose of determining whether the fact findings of the District Court holding Crescent solely at fault for the collision with the bridge are clearly erroneous. Since the Court of Appeals held that Dixilyn had to indemnify Crescent for Crescent's own negligence, it did not consider Crescent's claim in the Court of Appeals below that the trial court's findings of sole fault on Crescent were clearly erroneous.

While the evidence in the record not only sustains, but forcefully compels the finding of sole fault against Crescent made by the District Court, as the Court of Appeals below did not consider Crescent's contention to the contrary in its original opinion, it is apparently

necessary for this Court to remand it to the Court below for his purpose.

Respectfully submitted,

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December ____, 1962

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Brief for Petitioner have been served on the attorneys for the Respondent, Mr. Charles Kohlmeyer, Jr., Lemle & Kelleher, 1836 National Bank of Commerce Building, New Orleans 12, Louisiana and on Messrs. Brunini, Everett, Grantham & Quin, First National Bank Building, Vicksburg, Mississippi by depositing the the same in the United States Post Office with First Class Air Mail postage prepaid to the addresses shown above on this the ____ day of December, 1962.

Of Royston, Rayzor & Cook

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 297

DIXILYN DRILLING CORPORATION,
Petitioner,

versus

CRESCENT TOWING & SALVAGE COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT

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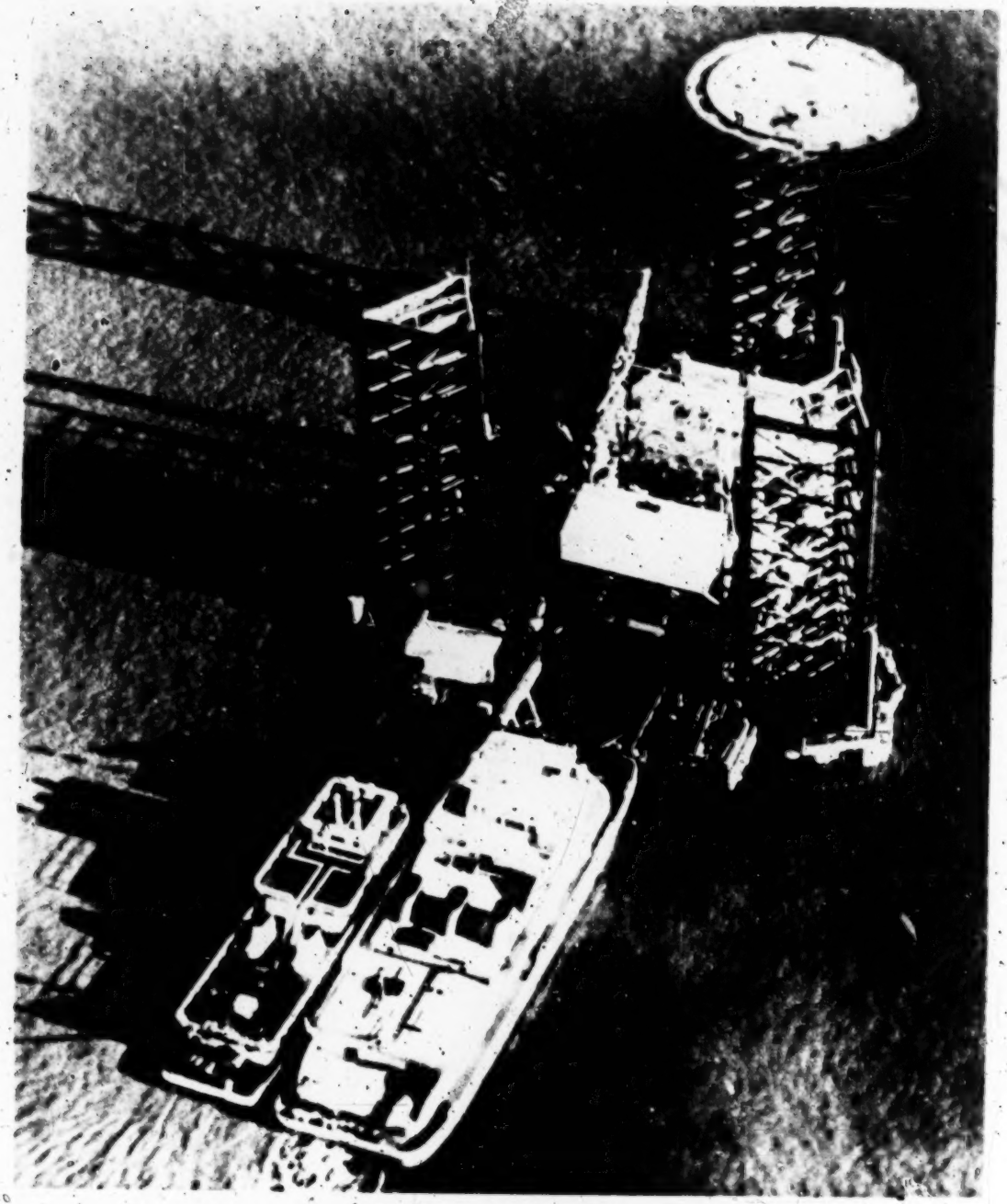

DIXILYN EXHIBIT 2

The above picture was taken after JULIE ANN left the LeTourneau yard on the morning of December 29, prior to the time that Crescent's Tug ORLEANS met the flotilla and prior to the collision with the Bridge.

IN THE

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT

PRELIMINARY STATEMENT

This suit originated with the filing of a libel in Admiralty in the Southern District of Mississippi by the Mississippi and Louisiana Highway Departments against Dixilyn Drilling Company (Dixilyn) and Crescent Towing & Salvage Company, Inc. (Crescent) for damages sustained by the Natchez-Vidalia Bridge over the Mississippi River when it was struck by Dixilyn's drilling barge *Julie Ann*, which was being towed downriver from Vicksburg to New Orleans by Crescent. Both respondents answered the suit denying negligence and liability. In addition, Crescent simultaneously filed a petition under the 56th Admiralty

Rule charging that the proximate cause of the damage to the bridge was solely due to the negligent operation of the legs of the drilling barge by employees of Dixilyn. Crescent further plead that Dixilyn had agreed to indemnify it for any claim arising out of the towage and had agreed in the towage contract to procure insurance which would inure to the benefit of Crescent, and sought a recovery over from Dixilyn in the event that it was cast.

Prior to trial, the respondents stipulated that one or the other or both were responsible for the damages, and with the approval of the court, satisfied the claim of the libellant and agreed to litigate between themselves the question of the ultimate responsibility for the damages. The trial resulted in the District Court finding that Crescent's negligence was the proximate cause of the damage and that no indemnity or release was expressed or implied in the contract of towage. A decree was accordingly entered for Dixilyn.[1]

The Court of Appeals for the Fifth Circuit did not reach the factual issue. It found that the towage contract contained an assumption of liability and an agreement to cause Dixilyn's insurance to inure to the benefit of Crescent; it held the stipulation binding on Dixilyn and reversed, with an instruction to enter judgment consistent with its opinion.[2]

On the petition of Dixilyn, this Court granted certiorari limited to the two questions presented by the application: the validity *vel non* of the contract and the propriety of the interpretation placed upon it by the Court of Appeals. The factual issue of negligence accordingly is not before Your Honors at this time.

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[1] Record, p. 151.
[2] Record, p. 153 ff.

STATEMENT OF FACT

In the belief that the statement contained in Dixilyn's brief is deficient, and although the entire controversy between the parties is not presently before the Court, it is deemed proper to delineate the nature of the towage contract which was entered into by the parties and the rights and obligations which each sought to impose upon the other by virtue of the contract. To this end, there has been included in this brief, as the frontispiece, Dixilyn's Exhibit 2, which was introduced in evidence on the trial and which, although not contained in the abbreviated record filed herein, is included so that the Court may recognize the unusual nature of the towage involved and the type of craft referred to when the words "drilling barge" are used as descriptive of the *Julie Ann*. The Court of Appeals properly described the drilling barge as follows:

> "The *Julie Ann*, constructed at the LeTourneau plant at Vicksburg, is a self-contained, submersible type drilling rig. She is 193 feet long, 151 feet wide, and has a displacement of 2500 tons. She is triangular in shape, with legs of open truss steel frame construction 175 feet long set on each corner of the triangle. Approximately 30 feet of the legs had not been installed at the time of the collision. The lower end of each leg consists of spud tanks or feet 35 feet in diameter and about 35 feet in height. The legs provide a tripod on which the hull of the barge can be raised or lowered for drilling operations or for navigational purposes. The legs are operated from a control room situated above the quarters. They are lowered and retracted by three 60 cycle motors powered by three generators, any one of which is capable of lowering or retracting all three legs simultaneously. The legs are controlled by three levers, all of which can be manipulated so that each leg can be raised or lowered by itself or with one or both of the other legs.

> "The barge hull itself is 20 feet in depth (from main deck to bottom), and at the time of the collision the hull afloat was drawing approximately 13 feet. Below the main deck is a machinery deck containing a complex of equipment and tanks necessary for drilling operations, including mud tanks, water tanks, and fuel tanks. On the main deck are located draw works, pipe racks and anchor winches. Two story living quarters are situated above the main deck, completely equipped as spacious and comfortable accommodations for 45 men, all air-conditioned and equipped with a modern galley, laundry and recreation lounge. The rig is a complete self-contained unit, capable of drilling in more than 100 feet of water, and includes in her equipment slush pumps, a Schlumberger unit, cement unit, mud lab, water evaporator, mud pits and mixers, jets and guns, six diesel engines, and six electric generators."[3]

Recognizing the difficulty in navigating and maneuvering the bulky tow downriver, which required the lowering and raising of the legs to pass under several power lines and at least three bridges over the Mississippi, Crescent's representatives negotiated a contract with the representatives of Dixilyn and confirmed the understanding by letter dated December 19, 1957, to which there was attached a so-called towage release clause. The letter is as follows:

> "We wish to confirm our recent conversation including Mr. M. O. Bering, Jr. and Mr. Mike Smith, in which we discussed the towing of the 'JULIE ANN' from Vicksburg to our Fleet Landing in the New Orleans harbor.
>
> "We understand that the 'JULIE ANN' will be ready to leave Vicksburg the morning of December 26th and we expect to be in Vicksburg ready to

[3] Record, p. 154.

> move her at that time; we contemplate using two river pushboats (towboats) of substantial horsepower and one tugboat. For the trip from New Orleans to her offshore location, seagoing tugboats will be used.
>
> "This tow will be performed by Crescent subject to towage release clause, copy of which is attached and is part of our agreement with you; it being mutually understood and agreed that in consideration of including this clause lower rates prevail. It is also necessary that we (Crescent Towing & Salvage Co., Inc.) be included in the 'JULIE ANN' hull and P & I Insurance coverage and we will appreciate receiving a letter or telegram from your underwriters or brokers to this effect as soon as possible.
>
> "We will continue to keep in touch with your office and know that you will advise us if there is any change in the anticipated readiness of the rig at Vicksburg. We appreciate very much your calling upon us to tow the 'JULIE ANN'.[4]

Dixilyn found the release clause attached to the letter unacceptable; Crescent therepon supplemented the original letter with another letter dated December 23, one sentence of which was also found unacceptable by Dixilyn. That sentence was stricken and the letter was then rewritten and endorsed "Approved" by Dixilyn and returned to Crescent. The second letter with the stricken portion indicated is as follows:

> "With further reference to our undertaking to tow your drilling barge 'JULIE ANN' from Vicksburg to our Fleet Landing in New Orleans and then down the Mississippi River into the Gulf, we confirm that the following additional clause shall be included in the contract as part of the consideration for our undertaking the towage:

[4] Record, p. 157.

"You agree to indemnify us, our tugs and equipment and all other parties taking part in the towage and their equipment and our and their underwriters of and from any and all liability or claims which may arise out of the towage of the drilling barge. It is particularly understood and agreed that you are authorized to and by this agreement do release and relieve us from any liability for account of your underwriters and that any damage claims urged by third parties as well as any claim which may be urged by virtue of damage to the drilling rig in the course of the towage shall be for your account and account of your underwriters.

"It is further understood that the amount of the insurance protection which you have in force equals the value of the hull of the barge as to hull insurance and amounts to four million dollars as to third party claims.

"If the foregoing meets with your approval and represents this portion of our agreement, please sign and return to us the attached three copies of this letter, retaining the original and the other copy for your files.[5]

Crescent's position is that the evidence clearly shows that Dixilyn was fully apprised of the nature of the agreement under which the drilling barge was to be moved. It is further Crescent's position that the two letters constituted the terms of the contract between the parties, and that those terms clearly and unequivocally afforded Crescent the benefit of Dixilyn's insurance and granted Crescent an indemnification against claims for damages arising during the towage, howsoever arising. Accordingly, Crescent claims that Dixilyn bound itself to reimburse Crescent for Crescent's half of the damages paid to the bridge owners.

On the contrary, Dixilyn takes the position that the

[5] Record, p. 159.

meaning of the contract is vague and indefinite insofar as the indemnification and the agreement to afford the benefit of its insurance to Crescent are concerned, and that in order for a contract to shift responsibility for negligent acts from one party to the other where negligence is involved, the word "negligence" must be used to connote the intention of the parties: since that "talismanic" word[6] was not used, the contract should be interpreted as not shifting responsibility for Crescent's negligent acts to Dixilyn. The foregoing argument is based upon the presumption, erroneous, we submit, but presently not before the Court, that the accident was caused by the sole negligence of Crescent.[7]

Secondly, Dixilyn argues that even if the contract were to be interpreted as shifting liability for negligence from Crescent and its underwriters to Dixilyn and its underwriters, such a shifting is reprobated by the *Bisso v. Inland Waterways Corporation* decision.[8]

ARGUMENT

Petitioner's application for certiorari and its brief in support thereof present to the Court two questions, the first being addressed to the validity of the contract provision under the *Bisso* rule, and the second being addressed to the propriety of the interpretation placed upon the towage contract by the Court of Appeals for the Fifth Circuit. It is submitted that a logical development of the argument herein requires that the second point be dealt

[6] *Batson-Cook Co. v. Industrial Steel Erectors*, 257 F. 2d 410, 412 (5th Cir. 1958). It is to be noted that in this case the "talismanic" word "negligent" was not used in an indemnification agreement, and the court was unable to find "the equivalent clear intent in other language of the agreement."

[7] The findings of the lower court were attacked on appeal to the Court of Appeals, which, although not reaching a decision on the findings, did indicate that if such a review had to be made the court would have been confronted "with an extremely difficult decision." (Record, p. 154)

[8] 349 U.S. 85 (1955).

with first, and accordingly, the first portion of this brief is addressed to the question of whether or not the contract between the parties should be interpreted as shifting liability for negligent damage to the property of third parties from Crescent and its underwriters to Dixilyn and its underwriters.

THE INTERPRETATION OF THE CONTRACT

The contract between the parties consists of letters sent by Crescent to Dixilyn, a copy of the second of the letters having been endorsed "Approved" by Dixilyn. Stripping out of the letters the matter not here material, it appears that Crescent agreed to tow the drilling barge *Julie Ann* from Vicksburg to its Fleet Landing in New Orleans by the use of two river pushboats and one of its tugs. The towage was to be performed subject to a towage release clause, in consideration for which lower towing rates would prevail. Crescent further required that it be named in the existing insurance on the *Julie Ann*.[9]

Such was the substance of the first letter. The second letter, commencing with the words, "With *further* reference to our undertaking to tow this drilling barge * * * ", confirmed that an *additional* clause would be included in the contract to the effect that "any damage claims urged by third parties shall be for your (Dixilyn's) account and account of your (Dixilyn's) underwriters." This letter further confirmed the amount of Dixilyn's liability insurance to be four million dollars, and closes with the sentence, "If the foregoing meets with your approval and represents *this portion* of our agreement, please sign and return to us the attached three copies of this letter, retaining the original and the other copy for your files." (Emphasis added)

[9] See note 4, *supra* and accompanying text.

It is our submission that not only was the shifting of ultimate liability for any claims arising out of the towage expressly stated, but that the object and intent of the parties in confecting the agreement was clear and unequivocal. Certainly, Dixilyn in its discussion with its underwriters was advised as to and understood the clear import of the contract.[10] If the contract was not intended to shift liability for third party claims, why would there be an express statement to the effect that Dixilyn carried four million dollars of insurance "as to third party claims"? Obviously, there would be no need to refer to insurance against third party claims if it were not the intent of the parties to have the insurance there referred to respond to such claims. If Crescent were to be liable for all third party claims, then it would have no interest in the amount of insurance carried by Dixilyn, whether the negligence of Dixilyn or that of Crescent were the proximate cause of the damages.

Even clearer is the language of the contract to the effect that "any damage claims urged by third parties * * * shall be for your account and account of your underwriters." This is plain, understandable businessman's English, not "legalese." There was no need to refer to third party claims resulting specifically from Crescent's negligence; *any* damage claims urged by third parties arising out of the towage were to be for the account of Dixilyn and Dixilyn's underwriters. In other words, the plain and crystal clear language of the contract, as well as the intention of both parties to the contract, clearly and unequivocally shifts liability for third party claims, howsoever arising, from Crescent to Dixilyn. If the claim were to have sprung from Dixilyn's negligence; Crescent would have no liability; its interest must have stemmed

[10] Record, p. 108.

from the understanding that Dixilyn's insurance was to cover "any damage claims."

Crescent's corporate officer who negotiated the contract of towage testified without equivocation that the towing of the barge was particularly dangerous and hazardous and that since this was not an ordinary towage movement such as would usually be undertaken by Crescent, a release of some type was required.[11]

The same testimony was elicited, although with difficulty, from the Dixilyn official who approved the agreement on behalf of that company, when he said in answer to a question on cross-examination that he understood that Crescent was not to be responsible for damages sustained by third parties during the course of the towage.[12]

The thrust of Dixilyn's argument is that the contract did not clearly state the position of the parties, and that if the contract is not clear and unequivocal, the Court of Appeals should have found that the provision to shift liability from Crescent to Dixilyn was null and void. It claims that the court below erred in applying the general doctrine that

> " 'The cardinal rule of interpretation of indemnity contracts is the same as in the case of other types of contracts, namely, the ascertainment of the intent of the parties.' Annotation 175 A.L.R. 29." [13]

There are two answers to this argument: The first conclusive answer is that findings as to the interpretation to be accorded a contract are findings of fact, and, as Mr. Justice Holmes said,

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[11] Record, p. 87, 88.
[12] Record, p. 127.
[13] Opinion below, Record, p. 163.

> "We do not grant a certiorari to review evidence and discuss specific facts."[14]

Although there is presented here no conflict in the testimony of witnesses as to the intention of the parties, this Court would have to analyze the respective contentions of Dixilyn and Crescent, and would have to study the transcript and generally try the case *de novo* in order to resolve the factual issue, for:

> "The question of interpretation of language and conduct—the question of what is the meaning that should be given by a court to the words of a contract, is a question of fact, not a question of law."[15]

This Court is far too busy to be put upon by litigants who desire a redetermination of an adverse decision on factual issues. As Mr. Justice Jackson stated,

> "The hearing of contentions as to disputed facts; the sorting of documents to select relevant provisions, ascertain their ultimate form and meaning in the case, the practical construction put upon them by the parties and reduction of the mass of conflicting contention as to fact and inference from facts, is a task primarily for a court of one judge, not for a court of nine."[16]

In a case involving a factual issue, those facts were mixed with a legal point when Your Honors granted certiorari in *Rogers v. Missouri Pacific Railroad Company*.[17] Mr. Justice Frankfurter gave written reasons why he believed the writ to have been improvidently granted, there having been presented to the Court what he conceived to be solely an issue of fact.[18] It is respect-

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[14] *United States v. Johnston*, 268 U.S. 220, 227 (1925).
[15] Corbin, Contracts, § 54 (1960).
[16] *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256 (1948).
[17] 352 U.S. 500 (1957).
[18] *Id.* at 524; *cf. Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 332.

fully submitted that Your Honors should not disturb the finding of the court below under any circumstances, whether or not it was erroneous, because a factual issue alone is involved.

Alternatively, it is submitted that the decision below was clearly correct. Dixilyn argues that two well-established rules of law were disregarded by the court below: (1) It failed to construe the contract against the party who drafted it, and (2) it failed to apply the rule that an indemnity agreement is to be strictly construed in favor of the indemnitor. Assuming, *arguendo*, that the agreement purports only to constitute an indemnity agreement, the overriding and most important principle in aid to the interpretation of a contract is the age-old theory that the court should look to the intent of the parties and should not attempt to rewrite a contract rather than to enforce it as written.

These rules of construction are, of course, inapplicable where, as here, the contract is clear and unequivocal. The court below has found the intent of the parties to be consistent with the written words of the contract. Dixilyn overlooked this, and in the course of developing its argument, Dixilyn fails to cite the leading case decided by this Court in the past 20 years on the interpretation of an indemnity agreement. In *Porello*,[19] this Court remanded to the district court for the taking of evidence as to intent a case involving the interpretation of a contract providing for an indemnity where the word "negligent" was used, but where the Court could not decide if sole negligence or joint negligence on the part of the indemnitee was intended to be covered.[20]

[19] *American Stevedores, Inc. v. Porello*, 330 U.S. 446 (1947).

[20] *Cf. Muratore v. U. S.*, 100 F. Supp. 276, 285 (S.D. N.Y., 1951) on the problem of interpreting an indemnity contract, and Judge Clark's analysis *A/S J. Ludwig Mowinckles Rederi v. Commercial Stevedoring Co., Inc.*, 256 F. 2d 227, 229 (2nd Cir. 1958).

Moreover, it would seem that the rule for which Dixilyn contends is the old rule, which has given way to a complete reversal by virtue of the trend of the modern jurisprudence. There is no present reason why a contract of indemnity should be interpreted any differently from any other kind of contract. As pointed out above, the paramount aim of a court in interpreting a contract is to find the intent of the parties so that the contract can be enforced as the parties wished. Courts should never rewrite contracts. The old rule which gave rise to the strict construction of indemnity agreements, we submit, found its genesis in the fact that certain types of such contracts were held to be illegal as against public policy, but the jurisprudence has completely changed. This statement is well pointed up by an examination of *American Jurisprudence*, where the text of the permanent, bound edition published in 1940 reads:

> "The authorities are conflicting as to the validity of an agreement to indemnify against the negligence of the indemnitee, the majority holding such a contract to be void."[21]

The 1962 Cumulative Pocket Part of this volume, however, points out that "A contrary view is taken by the great majority of modern cases", and further states that "According to the great weight of modern authority, the parties to indemnity contracts may validly bind themselves by contract to indemnify the indemnitee against or relieve from liability on account of his own future acts."[22]

What Dixilyn complains of is that the Court of Appeals for the Fifth Circuit has determined it will follow the modern rather than the old jurisprudence. This

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[21] 27 Am. Jur., *Indemnity*, § 9.

[22] Accord: 42 C.J.S., Indemnity, § 7 (1944): "The parties may lawfully bind themselves by contract to indemnify against or relieve from liability on account of future acts of negligence * * * ".

rationale, however, was not originally announced in the instant case. The court's first decision adopting the "modern" view was rendered on November 17, 1961, when *Jacksonville Terminal*[23] was decided. An application for a rehearing was made and was denied. Likewise, certiorari was applied for, and this too was denied on April 23, 1962.[24]

Because of the stress that has been placed upon the prior jurisprudence of the Court of Appeals for the Fifth Circuit, it is believed that it is proper for us to quote from the opinion in *Jacksonville Terminal* at length. It is to be noted that Chief Judge Tuttle, who wrote the opinion for the court, was well aware of the two views which were pressed upon him by the adversaries in *Jacksonville Terminal* and that the old rule was recognized but was not followed because of the opinion of the court that it rested " • • • on an unsound and dangerous foundation." The opinion continues:

> "It presumes, first of all, that one party's assumption of liability for losses due to another's negligence is an 'unusual' and 'hazardous' undertaking. We cannot agree. In the light of modern conditions, we perceive little justification for so characterizing the indemnitor's obligation. Insurance companies assume this obligation every day, especially in connection with automobile liability policies. And, it is common knowledge that the device of insuring against one's own negligence through indemnity contracts is frequently employed in other business ventures.
>
> "Perhaps more important, even assuming that the burden imposed on the indemnitor is 'unusual' or 'hazardous', the majority rule presumes that

[23] *Jacksonville Terminal Co. v. Railway Express Agency, Inc.*, 296 F. 2d 256.

[24] ..... U. S. ....., 82 S. Ct. 949.

courts have the power to alleviate or eliminate this burden by construing the indemnity agreement in a manner which is patently inconsistent with the plain and clear meaning of the language employed by the contracting parties. This is a dangerous and unwarranted extension of the judicial function. If a court feels that a contract imposes an extraordinary liability on one of the parties, it may, in certain instances, pronounce the contract void as being contrary to public policy. But where, as here, a contract does not violate public policy, we have no authority to achieve the same result by concluding that the parties did not really mean what the unambiguous language of their agreement imports.

"There was no mistake of fact or law which induced either of the parties to enter into this contract. There was no fraud or duress. The parties were admittedly of equal bargaining power. Indeed, REA itself drafted the terms of the indemnity clause. In this situation, we must adhere to the wise and well established principle that the court will not make a contract for the parties. REA freely consented to indemnify JTC for 'all losses, etc.' arising in connection with its use and occupation of the terminal premises. It did not see fit to exclude losses caused by JTC's negligence. It cannot now complain of the consequences." (Footnotes omitted)

It is respectfully submitted that the contract should be interpreted as written and as the parties intended: that Dixilyn assumed responsibility for *any* damage claims which might be urged by third parties arising out of the towage of the drilling barge and that such claims should be for account of Dixilyn and its underwriters. The decision of the court below was right on this phase of the question and should be left undisturbed.

THE VALIDITY OF THE CONTRACT CLAUSE UNDER THE BISSO RULE

Although petitioner framed the "question presented" in its application for certiorari as one simple question, in fact it has three major facets, each of which, we submit, require affirmative answers as to the validity of the contract clauses. The question should be broken down into three separate questions as follows:

(1) Does the contract between the parties provide for a shift of the liability for damages to the property of third parties from the towing tug and its underwriters to the towed barge and its underwriters by affording the tug the benefit of the barge's insurance, and if so, is such an arrangement valid?

(2) Does the contract provide for a shift of the liability for damage to the property of third parties from the tug to the barge in consideration of the performance of the towage at a reduced rate, and if so, is such an arrangement valid?

(3) Does the contract between the parties provide for a shift of the liability for damage to property of third parties from the tug to the barge, and, if so, is such a provision valid within the framework of the instant situation: a hazardous and unmaneuverable tow of an extraordinarily high value being towed through hazardous areas and at extraordinary risk both as to amount and as to navigational problems expected to be encountered?

Petitioner's brief is addressed only to the problems inherent in the third of the foregoing questions. The possibility of having petitioner's insurance inure to the benefit of the tower, and the question of whether a release agreement might be arranged in consideration of a reduction in rate are completely ignored. We submit that the

contract can be supported on both of these grounds, as well as on the third ground alone.

The record shows that both Dixilyn and Crescent had in effect ample insurance on their respective craft to cover the entire amount of the damage to the bridge. The record also shows, however, that Crescent quoted Dixilyn its usual hourly rate for routine towing performed in the harbor of New Orleans, which does not involve unusually hazardous situations and which does not involve moving craft of such extraordinarily high values. Finally, the record shows that the premiums for marine insurance are computed largely on the basis of loss experience, and if in the course of a towage, a four million dollar drilling barge were to be lost, the four million dollar loss would be debited against the Crescent insurance record.[25] It would take years of premiums at much higher than current rates for such a loss record to be absorbed and for the premiums to return to what would be classified as the norm. During these years, Crescent would not be competitive with other towers, who would be operating at a substantially lesser cost because of the fact that insurance rates amount to such a high percentage of the overall expense of a marine operation.

Crescent had experience in moving drilling barges on prior occasions to the instant one, and it has been shown that the premium for a policy of trip insurance on the Barge *Julie Ann* for this one voyage would approximate $40,000.[26] Such a premium would make the movement of the barge almost prohibitive. It was probably for this reason that Dixilyn voluntarily chose to assume responsibility for damages rather than permit Crescent to take out a special trip policy on the barge. Crescent's charge of its stipulated harbor rate of $35 per hour for its tug

[25] Record, p. 97.
[26] *Ibid.*

was based upon the fact that the extraordinary perils and the extraordinary value at risk could not affect its insurance rates, because damage claims stemming from the movement would not be chargeable to the Crescent experience rating.

Dixilyn attempts to hide behind its purported inexperience in the field as an excuse for its failure to understand its agreement. It is obvious from the record, however, that Dixilyn was in close contact with its underwriters during the negotiations, and indeed had the representatives of the underwriters sitting in on all of the conferences and discussing all of the terms of the movement with Crescent. If it were not understood by the underwriters that losses were to be borne by them, on what theory would they be interested in the negotiations?

Moreover, modern business conditions, as Chief Judge Tuttle pointed out in *Jacksonville Terminal*,[27] have come to a point where dual insurance costs have been eliminated in many fields through the means of indemnifications and the cross-naming of parties in insurance policies. There was no reason why dual insurance should be carried, because Dixilyn already had insurance of its own which could be endorsed to cover any claim which might ensue, and if Crescent took out a special trip policy on the drilling barge, nothing would have been accomplished except to add to the cost of the movement.

Such arrangements are by no means uncommon in the area of this contract, as is evidenced by the fact that Dixilyn's Vice President testified that he had executed many contracts with major oil companies covering the drilling of oil wells and that every one of those contracts contained hold harmless and indemnity agreements.[28] There

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[27] *Supra* note 23 and accompanying text.
[28] Record, p. 105.

was, therefore, nothing novel about an indemnity agreement to Dixilyn, and the fact that there was a shift of liabilities from Crescent to Dixilyn in the instant case was in conformity with, not in contravention of, the usual business policy in this area. We submit there is no reason whatsoever which has been advanced by Dixilyn for the Court holding that it is improper or illegal for Dixilyn, under these circumstances, to afford to Crescent the coverage of its existing insurance. Ample business purpose existed for the arrangement, a good and valid consideration flowed to Dixilyn, and, we submit, no public policy exists which could be invoked as a bar to the agreement, freely arrived at by two parties negotiating without coercion and at arm's length.

The Court will understand that the contract between the parties provided that the shifting of liability from Crescent to Dixilyn was in consideration of lower rates for the towage. Admittedly, there was no quotation of the lower rate or even a mention of a figure on which Dixilyn could put its finger as in the case of a filed tariff of a common carrier; however, it is equally clear that Crescent contemplated obtaining a trip insurance policy on the drilling barge if it were not released from liability, and hence the cost of the policy, which would have ranged in the neighborhood of $40,000[29] would have been charged to Dixilyn in addition to the ordinary towage rate were the release not available to Crescent.

There would seem to be nothing strange about such a situation. Its counterpart is found in the tariffs of numerous common carriers where release values are set up in the tariffs or bills of lading of the carriers according to a shipper a limited right to recoup cargo damage from the carrier based on valuation. Without attempting

[29] Record, p. 97.

to labor the point, we simply point out that the whole rating system of charges by common carriers for the transportation of shipments is geared to valuation clauses, and that limitations on the liability of carriers based upon such valuations uniformly have been authorized by the Congress and held valid by the courts for many years.[30]

Moreover, it should be pointed out that the Carriage of Goods by Sea Act limits the liability of a carrier to $500 per package.[31] There is, therefore, nothing unusual about a water transportation contract including valuation clauses. The custom of the trade seems to be firmly established and the practice has been approved for many years by the Interstate Commerce Commission as well as being authorized by the applicable Congressional enactment relative to waterborne shipments.[32] It is our submission that there is nothing whatsoever in our law, whether statutory or judge-made, which would preclude a tower from adopting a system of rating its charges for towage. If the carrier may do so, certainly the tower should be able to take a like position.

Assuming that the contract between the parties simply provides for a release from liability for negligence on the part of Crescent, it is our submission that there is nothing in *Bisso* which precludes the enforcement of such a clause in the towage contract.

It would serve no useful purpose to attempt to develop the background of release clauses in towage agreements. That subject is covered fully in the majority and minority

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[30] Second Cummins Amendment, Act of August 19, 1916, 49 U.S.C. § 20(11); *Adams Express Co. v. Croninger*, 226 U.S. 491 (1913); and *Southeastern Express Co. v. Pastime Amusement Co.*, 299 U.S. 28 (1936), where the Court said:

> "The underlying principle is that the carrier is entitled to base rates upon value and that its compensation should bear a reasonable relation to the risk and responsibility assumed."

[31] Act of April 16, 1936, 46 U.S.C. 1304(5).

[32] See Mr. Justice Harlan's opinion in *Southwestern Sugar, f.* 9, 360 U.S. at 420.

opinions in the *Bisso* and *Winding Gulf*[33] cases. Those decisions, announced in 1955, held that in ordinary "run of the mill" towage situations, a release from liability granted by the tow to the tug would be considered as unenforceable for two main reasons: "(1) to discourage negligence by making wrongdoers pay damages and (2) to protect those in need of goods or services from being overreached by others having power to drive hard bargains."[34]

It is to be noted that *Bisso* was decided by an eight-man court, only four of the Justices voting in favor of the rule announced by Mr. Justice Black, speaking for the majority. Mr. Justice Frankfurter, supported by Justices Reed and Burton, dissented, and Mr. Justice Douglas concurred specially because of the deficiency found in the *Bisso* record, which did not convince him that the economies and organization of the tugboat industry required a rule contrary to what he conceived the rule of *The Syracuse*[35] to be. Although it is counsel's submission that the *Bisso* case reached an unwarranted result and that the result was not justified by the practice and almost universal custom of the industry, we nevertheless recognize, as we must, the existence of the rule announced in 1955.

We submit, however, that if this record had been presented to this Court in lieu of that presented in the *Bisso* case (the latter being completely silent on the economics of the situation), the result would have been different. Here it has been shown by a preponderance of the evidence that there was no economic power vested in Crescent which could have enabled it to coerce an unwilling customer,[36] and that this agreement was reached only

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[33] *Boston Metals Co. v. The Winding Gulf*, 349 U.S. 297 (1959).
[34] *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 at 91.
[35] 12 Wall. (79 U.S.) 167 (1871).

after negotiation at arm's length between two parties with equal bargaining power. In these days of expanding insurance markets, there can be no question but that both parties to a towing contract can carry insurance covering identical liabilities. Such insurance existed here. The question, therefore, is not whether one or the other had an economic power to drive a hard bargain, because such a power could not exist in the face of the competition shown to have been present; the question rather is which underwriter, Crescent's or Dixilyn's, ultimately will be required to bear the loss from the collision. The question is one of price, not policy.

Moreover, due to the availability of insurance (and its presence in this case on both barge and tug), no possible deterrent as to negligence is inherent in the release clause of the towage contract. Mariners generally are keenly aware of the legal rights and liabilities of their owners, and the reputation of a master is at stake each time he mounts the bridge of his ship. Any master who is known to be a negligent navigator soon finds himself on the beach, not only because of the owner's desire to protect his own reputation as an operator, but also because of the necessity of keeping his insurance costs down. As is shown here, the existence of insurance in the maritime field does not relieve the owner from additional costs in the event of the payment of a claim; claims are charged against the owner, and his experience rating and premium cost rises in direct proportion to the number of claims paid.[37] Even with insurance, therefore, owners still seek to discourage negligence and to require careful and prudent navigation.

Assuming, however, that the *Bisso* decision was rightly decided, it is submitted that there is here presented a

[36] Record, p. 83, ff.
[37] Record, P. 91.

situation which calls for the application of the rule suggested by Mr. Justice Harlan in *Southwestern Sugar*. There was involved in *Southwestern Sugar* a tariff provision releasing the vessel owner from liability for negligence. The clause was held not to be illegal *per se*, even in the face of the argument that *Bisso* precluded its enforcement, because of the clause having been incorporated in a tariff on file with the Interstate Commerce Commission. The Court stated, however, in the course of Mr. Justice Harlan's majority opinion, that if the peculiar hazards involved in towage are great and the method of guarding against the hazards are unsatisfactory, it may be that the federal courts "should creatively exercise their responsibility for the development of the law maritime to fashion a particularized rule to deal with particularized circumstances."[38]

This is exactly what the Court of Appeals for the Fifth Circuit has done in the instant case. It was found by Judge Rives that this case was one where "a particularized rule should be fashioned." His finding is amply supported by the evidence of the size and shape of the drilling barge, its lack of maneuverability, and the hazards which were inherent in raising and lowering the legs during the course of the downriver movement when going under bridges. Petitioner attacks the validity of the exception to the *Bisso* rule fashioned by the Court of Appeals pursuant to the admonition of *Southwestern Sugar* by charging that there were adequate ways by which the hazards could be guarded against, but these "adequate ways" are simply an application of the old saw—the "but-for" rule.

Petitioner argues that two conditions precedent must

[38] *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 419.

be present for the suggested rule of *Southwestern Sugar* to be invoked. These are that "(1) the peculiar hazards involved in towing a barge supplied by the shipper are great and (2) the methods of guarding against those hazards (are) uncertain."[39]

The argument is developed then that the hazards here were not great, because there could be a simple adjustment made in the position of the legs on the barge when navigated under bridges; and that the methods of guarding against the hazards were not uncertain because more horsepower or additional tugs could have been placed on the barge, which would have foreclosed the possibility of the collision.

Both arguments, of course, involve the resolution of questions of fact which are not presently before the Court and which may not be developed because of the record herein having been abbreviated to eliminate the factual testimony. Since, however, petitioner has seen fit to argue the facts, the argument must be answered briefly.

In the first place, the hazards involved in this tow are not limited to the particular accident which gives rise to this litigation. Certainly everyone having even the slightest connection with the maritime field and knowing the specifications of the *Julie Ann* would be aware of the numerous hazards to be encountered in towing the drilling barge from Vicksburg to New Orleans. These hazards were not limited to a transit under the Natchez-Vidalia bridge, but would include the necessity to pass under several power lines and at least two other bridges, passing large oceangoing ships, passing numerous tows, some having a length greater than that of the Queen Mary, passing fleets of moored barges, and all in a notoriously

[39] *Id.* at 419.

treacherous river with a strong current and numerous eddies. Even if the only problem had been transiting the Natchez-Vidalia bridge, the hazard of moving this barge with 144-foot-long legs, on the bottom of which were tanks 35 feet in diameter, should be obvious. The surface of the river being 92.4 feet below the bottom of the bridge and the river depth being only 55 feet just above the bridge,[40] simple arithmetic shows that it was impossible to lower the legs to such an extent as to permit safe clearance until the last moment before going under the bridge. Moreover, there was a conflict in the testimony as to whether the draft marks on the legs were correctly read and reported, and the duty of controlling the legs was clearly imposed on the Dixilyn crew who were operating the barge. The only personnel of Crescent aboard the barge at the time of the accident was the master of its tug *Orleans*, who took that position solely and only for navigational reasons.

Moreover, petitioner argues that the method of guarding against the hazards of fouling the bottom of the bridge or fouling the bottom of the river with the legs could have been obviated by the simple expediency of adding more tugs to the tow. Though this may be true, a factual issue is again involved, and again this issue may not be resolved on the face of the record presently before the Court. There is a conflict in the testimony as to whether additional tugs would have done much good in stopping the drilling barge once it had been permitted deliberately to gain momentum and float downriver under the bridge, and there is also a conflict as to whose duty it was to judge how many tugs were required for a safe transit. Although the district court found Crescent at fault for not furnishing sufficient horsepower and also found the master of Crescent's tug guilty of negligence,

[40] Opinion below, Record p. 155.

it is Crescent's position that it was guilty of no negligence, and that the cause of the accident could be traced directly to the negligence and fault of the Dixilyn employees operating the legs of the *Julie Ann*. Moreover, as was pointed out above, if the Court of Appeals had reached this issue, it is probable that it would have reversed the district court on its finding of fact, for it said in the course of its opinion that:

> "A review of the district court's findings of fact would confront us with an extremely difficult decision."[41]

It is submitted that this case, involving the towage of a drilling barge where the legs of the barge were operated by the crew of the barge and where the hazard of fouling the bottom of the river or the bridge was admittedly great, Crescent had no opportunity to avoid or guard against the hazard of the operation of the legs by the members of the crew of the barge, over whom it had no control. This case is singularly within the scope of the doctrine espoused by Mr. Justice Harlan in *Southwestern Sugar*, and calls for the inferior courts under our system of adjudicating maritime matters to fashion a rule to fit these circumstances involving extra hazardous undertakings in the field of towage.

The *Bisso* case, we submit, was improperly decided on an incomplete record. Towage, of course, partakes in some instances of common carriage, in others of transportation, and in still others of pure towage in the usual and accepted sense of the word. For example, there are innumerable regulated companies operating on the inland waterways of the United States which own their own towboats and barges and which operate as common carriers under Part III of the Interstate Commerce Act. River

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[41] *Id.* at p. 154.

Terminals Corporation, the respondent in *Southwestern Sugar*, is an example of such a carrier; Mississippi Valley Barge Line Company, the unsuccessful respondent in *Labelle*[42] is another such company. It is to those companies that Mr. Justice Black referred in his majority opinion in *Bisso*.[43] The common carrier towers on the inland waterways are, to a large extent, the owners of those transportation lines which are described in the publications of the Corps of Engineers, U. S. Army, referred to in Mr. Justice Frankfurter's dissent in *Bisso*.[44]

A second category of "towers" is exemplified by the unregulated carriers of merchandise for hire, one of which was before the Court in *Sacramento Navigation Company v. Salz*.[45] It is to be recalled that this company was held to be a common carrier under the facts involved in that case, and as such was entitled to the benefits of the Harter Act as to liability for damage to cargo loaded in one of its barges being towed by one of its tugs.

Finally, there is the tower who is the classic example of one furnishing motive power to a vessel such as is described in *Stevens v. The White City*,[46] *Sun Oil Co. v. Dalzell Towing Co.*,[47] and many other cases. Into this latter category fall the numerous tugs engaged throughout the world in furnishing harbor towage to vessels ranging in size from luxury passenger liners to small freighters.

It is submitted that the three classifications of towage should require the application of different rules of law as to damage claims. Insofar as carriage is con-

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[42] *Mississippi Valley Barge Line Co. vs. T. L. James & Co., Inc.*, 244 F. 2d 263 (5th Cir. 1957), cert. den. 355 U.S. 871, motion for leave to file petition for rehearing denied 358 U.S. 901.

[43] 349 U.S. at 89 and at 91, fn. 9 and 18.

[44] 349 U.S. at 117; *f.* 14.

[45] 273 U.S. 326 (1926).

[46] 285 U.S. 195 (1932).

[47] 287 U.S. 291 (1932).

cerned, there should be no doubt but that a "tower" should be treated as a carrier when acting as a carrier. The transportation companies operating through the medium of tug and barge and carrying cargo certainly must be held to be carriers subject to the provisions of the Harter Act or the Carriage of Goods by Sea Act insofar as their relationship to cargo is concerned. The liability to the owner of the barge being moved, however, does not stem from the same theory as does liability to cargo. In the one case, statutory regulation of the carriage is involved; in the other towage is involved.

On the other hand, if six Moran tugs are engaged in landing the *Queen Mary* at Cunard's pier in New York City, those tugs are by no sense of the word engaged in "carrying" or "transporting" the vessel. They are engaged in towage, and towage, under Your Honors' rule, rightly is not classified as carriage. The obligations, therefore, of the operator of the tugboat as to the craft in tow are completely different from the obligations of the operator of a towboat pushing his barge of sugar along the Mississippi River to the owner of the sugar.

The fact is that the *Basso* decision has placed the transportation industry in the anomalous position of having imposed upon it a higher standard of care insofar as a towage contract is concerned than it has insofar as a contract of carriage is concerned. The anomaly is well pointed up by the following illustrative situation: A barge line owns and operates a tug and a barge, the latter loaded with sugar being transported between two river points in tow of the tug, which simultaneously is towing an empty barge belonging to a third party between the same points. If, through the negligence of the master of the tug, both barges are lost, the tug operator has an immunity from liability to the cargo owner, for under the

Harter Act and the Carriage of Goods by Sea Act, damage to cargo resulting from negligent navigation is excused.[48] On the contrary, even though the tug owner were to have entered into a contract with the owner of the empty barge whereby he was relieved from liability for negligent navigation, that clause in the contract would be void under the rule of the *Bisso* case. It is submitted that this anomaly must not have been called to the attention of the Court at the time that *Bisso* was argued, for it is hard to understand how, with traditional imposition by our law of the highest standard of care on a carrier, a tower could be held to an even higher standard.

It is submitted that *Southwestern Sugar* indicates a trend by Your Honors to get away from the *Bisso* rule. In that case, of course, there was a dissent on the basis of there being no power in the Interstate Commerce Commission to approve a tariff containing a legally invalid condition, but the majority opinion, though recognizing the argument, rightly overlooked it in order to permit the parties to go to the Commission to determine if there existed any justification for the release clause contained in the tariff. It is our submission that the decision in *Southwestern Sugar* is clearly correct. It may be, on the rivers, that owners of towboats may have mutual arrangements to tow each other's barges on a release basis; all types of considerations, such as reduced or alternative rates, can enter into the question of whether it is economically sound to permit a release to be incorporated in a towage contract, just as it is sound to hold that extraordinary hazards give rise to a permission to use extraordinary measures to obtain relief from the liabilities which might be incurred by virtue of the hazards.

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[48] *Sacramento Navigation Co. v. Salz, supra*; Harter Act, § 3 (Act of Feb. 13, 1893, 46 U.S.C. 192); Carriage of Goods by Sea Act, § 4 (Act of April 16, 1936, 46 U.S.C. 1304(2)(a)).

It is to be noted that in at least one case[49] decided since this Court announced its decision in *Bisso*, an exculpatory clause in a towage contract where it was contemplated that the tow would be made through ice was maintained on the theory that the extraordinary risk took the case out of the prohibited area.

Freedom of contract and the economics of this industry require that extraordinary situations be given extraordinary treatment, and we earnestly submit that there is no reason why this contract should not be maintained as written on all of the grounds discussed.

THE MEASURE OF DAMAGES

Petitioner's application for a writ of certiorari set forth two questions which were presented to the Court, but in its brief, a third matter, the measure of damages issue, has been engrafted on the application. It is submitted that this matter is not properly before the Court and that it should not be reached. If, however, the Court determines to consider the point as raised, it is our submission that it has no merit.

The *Wampler*[50] case stands alone in the jurisprudence. The portion of the decision which is relied upon is purely *obiter dicta*, and in addition, the case is distinguishable on the grounds set forth in Judge Rives' opinion below. In *Wampler*, the Court relied on a Texas case holding that where a party contracted to procure certain insurance coverage and failed to conform to his obligation, if the other party procured the proper type of insurance at an increased premium, the measure of damages for the breach of contract was the amount of the premi-

[49] *North River Barge Lines v. Chile Steamship Co.*, 214 F. 2d 882 (2nd Cir. 1954).

[50] *Standard Oil Co. v. Wampler*, 218 F. 2d 768 (5th Cir. 1955).

um. *Wampler* obviously has no application here, because Dixilyn for itself and its underwriters, agreed that its insurance would inure to Crescent's benefit and this accident occurred before Crescent was put on notice that Dixilyn and its underwriters would claim that the insurance was not available to cover the claim.

CONCLUSION

Respondent respectfully submits that the contract involved in this case must be interpreted in such a manner as to reach the result which the parties intended; that it is clear that the parties intended to shift the liability for the claim which is the subject of this litigation from Crescent to Dixilyn; and that they validly could do so. The decision below was right in all respects and should be affirmed.

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NO. 297

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

DIXILYN DRILLING CORPORATION, *Petitioner*

v.

CRESCENT TOWING & SALVAGE COMPANY, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

While it is felt that the points raised in the Respondent's Brief have been substantially covered in the initial Brief for Petitioner, it is felt that a few brief comments might be of some assistance to the Court. For the Court's convenience these will be covered in this reply in the order in which they are presented in Respondent's Brief.

I.

With respect to that part of Crescent's brief entitled "The Interpretation of the Contract",[1] four observations may be of some help to the Court:

1.

Crescent would have this Court ignore the question relating to the definitiveness of the contract on the theory that the interpretation of the contract is a fact finding and this Court should not concern itself with any fact findings. Crescent impliedly argues that the Court of Appeals below held that the contract was clear and unequivocal and that this was a finding of fact which this Court cannot examine. This, of course, is patently erroneous for the Court below specifically held that the contractual language was doubtful or ambiguous[2] and then proceeded to examine in detail the parol evidence in an attempt to determine the intention of the parties. Even the Court of Appeals recognized that the language in this contract was not as specific as required by the earlier decisions of this Court, and by the earlier decisions of the Court below, and thus proceeded to a consideration of parol evidence as to the intention of the parties. The question here is not: Did the Court of Appeals below correctly determine what the intention of the parties was from the parol evidence? But rather: Must the contract express the intention to indemnify against Crescent's negligence or the unseaworthiness of its vessels in the plainest of language or will the Court look to parol evidence in an attempt to ascertain the intention of the parties when the language of the contract is doubtful or ambiguous? Heretofore

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[1] Respondent's Brief, pages 9 through 15.

[2] R. 163.

when the language of an alleged indemnity contract was doubtful or ambiguous as the Court of Appeals below found to be the case here, the law had stepped in and said as a matter of law that the contractual language was not sufficient to require Dixilyn to indemnify Crescent for the consequences of its own negligence.[3] Thus the question here is:

> Does an indemnity agreement have to be specific to pass on to another party liability for the other's negligence or is doubtful or ambiguous language enough? This is not a fact question but one of law only.

2.

It is interesting to note that it was not until Crescent reached the Court of Appeals below that it ever contended that the contract was clear and unambiguous and could stand on its own feet, for upon the trial in the District Court below it was Crescent who insisted upon the introduction of parol evidence relating to the intention of the parties over the repeated objections of counsel for Dixilyn.[4] It was Crescent itself that insisted upon the record being burdened with parol evidence relating to the intention of the parties, not Dixilyn, thus, in fact, taking a position before the District Court below which is exactly the opposite from the position that it now takes. This is but one factor that indicates that even Crescent recognized at one time as have both Dixilyn and the Court of Appeals below that the language of this contract is not as definite as the law requires. If the language of the

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[3] See full discussion in Petitioner's Brief, pages 22 through 34.

[4] R. 42, 59. While not shown in the transcript printed in this Court, this objection was made a third time as shown by the record in the Court of Appeals below at page 354

contract was as clear and specific as Crescent now claims, why did Crescent insist on the parol evidence in an attempt to determine the intention of the parties.

3.

Crescent contends that not only the language in the contract but the intent of the parties was clear and unequivocal, and that there is no conflict in the testimony as to the intentions of the parties.[5] This is not correct as the record clearly shows:

(1) As Crescent acknowledges, Dixilyn flatly refused to accept a Tower's Release Clause in the contract which said that Crescent would be indemnified for certain damages from "any cause whatsoever, including loss or damages caused by negligence of the Master, Pilot and crew of the towing craft and our employees, agents and representatives."[6] This was Crescent's initial proposal as to the language to be used in the contract with a specific reference to Crescent's negligence, and it is undisputed that this was flatly and completely rejected by Dixilyn.[7] Yet Crescent contends that Dixilyn's acceptance of later language without negligence being mentioned was tantamount to agreeing to assume precisely the same liabilities for negligence which it had flatly and completely rejected in the initial submission by Crescent. What stronger evidence can be found that Dixilyn did not intend to indemnify Crescent for its own negligence than this rejection of that precise term

[5] Respondent's Brief, page 10.
[6] R. 23.
[7] R. 92; Respondent's Brief, page 5.

in the proposed clause for the contract which Crescent itself had drafted?

(2) Dixilyn's Mr. Tidwell, who was the man who primarily dealt with Crescent on the contract, testified categorically that Dixilyn never intended to protect Crescent from the results of Crescent's negligence and never intended for Dixilyn's insurance to cover Crescent's negligence.[8] Thus not only is the language of the contract doubtful and ambiguous but the intention of the parties is in direct and irreconcilable conflict. This, of course, becomes important only if it is determined that the previous decisions of this Court requiring an indemnity agreement to be spelled out in the plainest of language are to be overruled and the new and novel rule of law announced by the Court of Appeals below in this case inserted into our jurisprudence.

4.

Crescent's last argument in this section of its brief urges this Court to adopt or affirm the decision of the Court of Appeals below because this is the "modern rather than the old jurisprudence."[9] If it is modern jurisprudence to invite parties to a contract to leave to vague, doubtful and ambiguous language the question of whether or not one party is going to indemnify the other for the other's own negligence or the unseaworthiness of its vessels, then

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[8] Mr. Tidwell testified:

"Q. Was it ever your intent to agree to protect Crescent from the result of Crescent's negligence?

A. No, sir, it was not.

A. Was it ever your intention to have Dixilyn's insurance cover Crescent's negligent acts?

A. No, sir." R. 114.

[9] Respondent's Brief, page 13

we must confess that we are strong adherents to the old jurisprudence. What Crescent asks this Court to do is to encourage parties to all contracts to make them ambiguous and then bring their cases to the Courts for determination when, in fact, controversies such as this not only could but clearly should be absolutely and completely eliminated by the parties to a contract simply by complying with what has been the rule in this Court and in the Court of Appeals below and in at least five of the other Circuits for many years—to pass on these extraordinary liabilities, it must be plainly stated in the contract itself.[10] The decision of the Court of Appeals below leads to nothing but endless litigation with parol evidence almost universally in conflict on the intent of the parties, so the Courts must determine which party is being truthful about the intent of the parties. All of this conflict and uncertainty is easy to eliminate in the contract itself, and this Court can insure that such is the result in all future cases by applying its well settled rule that contracts of indemnity are strictly construed and must spell out the agreement to indemnify for another party's negligence in the plainest of language.[11]

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[10] See full discussion in Petitioner's Brief, pages 22 through 24.

[11] This simple sentence would have accomplished this purpose in this case if it were permitted by the **Bisso** rule, and would have avoided the litigation which has resulted thus far:

> "Dixilyn agrees to indemnify and hold Crescent harmless from any and all damages or claims arising out of the towage operation, including those caused whether in whole or in part by the unseaworthiness of any of Crescent's vessels, and/or by the negligence of Crescent, whether simple, willful or wanton, and/or by the negligence, whether simple, willful or wanton, of third parties or Dixilyn and/or by the unseaworthiness of the vessels of third parties or Dixilyn and/or by any combination of such causes."

II.

As to Respondent's Brief relating to the validity of the contract clause under the *Bisso* rule,[12] these comments may be helpful:

1.

Crescent once again devotes a substantial portion of its brief to the contention that "a shifting of liability from Crescent to Dixilyn was in consideration of lower rates for the towage."[13] This statement is absolutely unsupported in the record and is, in fact, directly contrary to all of the record evidence in this case. Crsecent's own Vice President Apgar as well as Crescent's Vice President Smith both testified categorically and unequivocally that no such choice of rates was ever offered or even discussed with Dixilyn personnel.[14] The only thing in the record that

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[12] Respondent's Brief, pages 16 through 30.

[13] Respondent's Brief, page 19.

[14] Mr. Apgar's testimony on this point was as follows:

"Q. Now then, Mr. Apgar, you never had any conversations at all with Dixilyn's people with respect to the rates that were to be charged in connection with this movement, did you?

A. No, because the only rate we could give them definitely was the rate on the ORLEANS, and we didn't know just what tugs we would be able to get at the time for this movement. We had hoped, of course, we would get the OUACHITA and TOLTEC, but at the time of the meetings we did not know definitely we would be able to get those vessels.

Q. And they left the question of the rates and the amount of money to be paid for the tows to be used in this operation entirely in your hands, did they not?

A. We told them that we would do the very best we could do on that, yes.

Q. They left it entirely in your hands, didn't they?

A. Yes, they never questioned that phase of it

refers to lower rates prevailing is in the letter of Crescent to Dixilyn of December 19, 1957, and it says that in consideration of the Tower's Release Clause attached to that letter being a part of the contract, lower rates will prevail.[15] But this Tower's Release Clause for which the lower rates allegedly would have prevailed was completely and absolutely rejected by Dixilyn, so that in truth and in fact any suggestion by Crescent that they would do it at lower rates if Dixilyn would accept the Tower's Release Clause attached to that letter of December 19, 1957, was completely and categorically rejected and that it was so rejected is clearly confirmed by Crescent Vice President Apgar's own testimony.[16]

Q. Never questioned it. In fact, they had no knowledge until they got your invoice as to how much this movement was going to cost them?

A. Yes, we assured them whatever—we would make sure these charges were reasonable.

Q. I'm talking about dollars and cents. They had no idea what it would cost in dollars and cents to make the movement?

A. I don't know whether they did or not. We didn't give them any idea that I recall." (R. 96)

. . .

Q. There was never any quotation or any indication given to Dixilyn of any kind that it would cost them so much to move this rig if they bore the brunt of the insurance and it would cost them so much more if you bore it?

A. That question never arose." (R. 98)

Mr. Apgar's testimony that no choice of rates was given Dixilyn was confirmed by another Vice President of Crescent, William S. Smith, Jr., who testified:

"Q. (By Crescent's counsel): No rates actually quoted as firm rates for this movement?

A. No, Sir." (R. 63).

[15] R. 22, 23.

[16] R. 92.

It is interesting to note that Crescent in its brief in this Court as well as in its brief in the Court of Appeals below does not refer the Court to a single record reference in support of its contention that a choice of rates was offered. This because it cannot do so, as the record is absolutely and completely void of any such evidence. Crescent's contention that a choice of rates was given to Dixilyn during the contract negotiations in this case is but a figment of someone's imagination and has absolutely no basis in fact or in the record.

2.

Crescent also attempts to create the impression in this portion of its brief that it would not have undertaken this towage if Dixilyn had not agreed to indemnify it or to do the same thing by giving Crescent the benefit of Dixilyn's insurance, and that in the absence of such an agreement by Dixilyn, Crescent would not have undertaken the towage. The inaccuracy of these inferences and conclusions is graphically pointed up by Crescent's letter of November 18, 1957, addressed to Dixilyn Drilling Corporation in which Crescent openly solicited the towage of this rig from Vicksburg, Mississippi to the Gulf of Mexico and represented to Dixilyn not only that it was extremely competent to handle the rig, but that all of its tugs "are fully insured both as to hull and P. & I., which we believe is a full guarantee of maintenance and efficiency.[17] Notwithstanding its open solicitation and representation to Dixilyn that it had all of the insurance coverage on its tugs that it needed, Crescent now insists that it never would have undertaken the towage of this rig

[17] R. 68, 69.

in the absence of Dixilyn's agreeing to indemnify it. This we submit is simply not a reasonable inference to be drawn from the evidence, particularly since Crescent actively pursued this towage contract after Dixilyn had flatly rejected the clause that would have clearly and unequivocally made Dixilyn indemnify Crescent for the consequences of Crescent's own negligence.

3.

Crescent also urges that there is no question of economic duress in this case because it has shown that there were a number of other companies engaged in the towage of offshore rigs. While the record does, in fact, reflect that there are a number of towage concerns who tow offshore rigs, Crescent's evidence falls far short of meeting its burden of establishing that there was no economic duress in this case for it did not offer any evidence that Dixilyn could have obtained this towage from any tug company under any contractual terms that did not include an indemnity agreement that was contrary to *Bisso*. To establish the lack of any economic coercion such as to cause this Court to give any consideration to overruling its decision in *Bisso*, it was incumbent upon Crescent to demonstrate not only that there were other tug companies that did this type of towage, but that there were other tug companies that would afford to Dixilyn the opportunity to have its rig moved with the tug company assuming all liability for the tug's own negligence or unseaworthiness. The record is entirely void of any evidence to this effect notwithstanding the fact that Crescent offered the testimony of two of its own vice presidents who purported to be completely familiar with the towage industry and contracts incidental thereto. In the absence of a showing

that Dixilyn could have obtained this towage with the tugs bearing the risks of their own negligence and unseaworthiness, Crescent has completely failed to establish the absence of any economic duress such as to justify a reversal of *Bisso* or an exception to its public policy rule.

4.

It is a little shocking to read in Crescent's Brief that Crescent in effect doubts that any additional tugs would have done much good in controlling the drilling barge.[18] Crescent takes this position as it tries to argue that this was such a hazardous undertaking that it justifies an exception to the *Bisso* rule. We say that it is shocking to see Crescent take this position in this case for in the Court of Appeals below Crescent took the position that the trial court's finding that insufficient power was furnished by Crescent to control the rig was clearly erroneous and in doing so relied on the testimony of its own Captain that the power was absolutely sufficient for all purposes. Now in its anxiety as it attempts to get this Court to create an exception to *Bisso*, Crescent acknowledges that it never complied with the very essence of its towage contract—that of supplying sufficient power to control the rig at all times—yet it represented to Dixilyn at all times that it could and would supply such power.

5.

It is also somewhat surprising to see Crescent urge upon this Court the establishment of a rule of law that would give towers the same protections from liability in a situation such as this as have been given to other maritime carriers

[18] Respondent's Brief, page 25

only by acts of Congress. In so doing, Crescent, of course, suggests the obvious answer to what it considers to be the injustices of the *Bisso* rule. The answer is not for the Court to change the public policy rule of *Bisso* by a court decision, but for this public policy rule to be changed by the legislative body elected by the people for that purpose—the Congress of the United States. That Congress in the exercise of its legislative powers has seen fit to give certain exemptions from and limitations of liabilities to some maritime carriers is, of course, no reason for this Court to conclude that Congress intended for all maritime carriers to have the benefits of similar exemptions or limitations of liability through court decisions. If the public policy rule of *Bisso* is to be changed, it is respectfully submitted that a carefully considered and planned statutory scheme such as those referred to in Crescent's brief should be enacted for this purpose and that it should not be done through judicial legislation.

Conclusion

It is respectfully submitted that the judgment of the Court of Appeals below must be reversed and this matter remanded to that Court to dispose of Crescent's contentions that the Trial Court's findings of sole fault on Crescent were clearly erroneous.

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Certificate of Service

I certify that copies of the foregoing Reply Brief for Petitioner have been served on the attorneys for the Respondent, Mr. Charles Kohlmeyer, Jr., Lemle & Kelleher, 1836 National Bank of Commerce Building, New Orleans, Louisiana, and on Messrs. Brunini, Everett, Grantham & Quin, First National Bank Building, Vicksburg, Mississippi by depositing the same in the United States Post Off with First Class Air Mail postage prepaid to the addresses shown above on this the_____day of March, 1963.

_____

Of Royston, Rayzor & Cook